# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

## No. [redacted]170

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, PETITIONER,

vs.

J. B. McGINN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 30, 1921.

CERTIORARI AND RETURN FILED JANUARY 24, 1922.

(27,374)

(27,974)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1920.**

# No. 617.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, PETITIONER,

*vs.*

J. B. McGINN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 3412

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

J. B. McGINN,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.**

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

**Names and Addresses of Attorneys of Record.**

R. L. EDMISTON, 540-1-2-3, The Rookery Bldg., Spokane, Washington,
Attorney for Plaintiff in Error.

ARTHUR C. SPENCER, Wells Fargo Bldg., Portland, Oregon, and HAMBLIN & GILBERT, Paulsen Bldg., Spokane, Washington,
Attorneys for Defendant in Error.

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*In the Superior Court of the State of Washington, in and for the County of Spokane.*

No. ——.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILWAY & NAVIGATION COMPANY, a Corporation,

Defendant.

**Complaint.**

Plaintiff for cause of action against defendant herein alleges:

I.

That plaintiff is a resident of the city and county of Spokane, State of Washington, and engaged in the business of buying and selling and otherwise handling and dealing in horses and mules, in the State of Washington, and elsewhere in the United States, and Canada, with office headquarters, barns and facilities in said city of Spokane.

II.

That defendant Oregon–Washington Railway & Navigation Company is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Oregon, owning, and prior to January first, 1918, operating as an interstate common carrier of passengers and freight for hire, a line of railroad in the States of Oregon, Washington, and east through connections of and with one certain connecting railroad, also an interstate common carrier of passengers and freight for hire, known as the Union Pacific Company, during said time operating between the cities of Omaha, Nebraska, and [1*] Huntington, State of Oregon, going by and through the cities of Grand Island, Nebraska, and North Platte, Nebraska, Cheyenne, Wyoming, Pocatello and Caldwell, Idaho, to and connecting with the said railroad lines of defendant herein at said city of Huntington, Oregon, which said defendant was during said times the owner and operator of railroad from said Huntington, Oregon, to Spokane, Washington, by and through the cities of La Grande and Pendleton, Oregon, and Walla Walla, Washington, and having general business offices and agents in the city and county of Spokane, Washington.

III.

That on or about the 13th day of February, A. D. 1917, at the city of Grand Island, State of Nebraska, plaintiff loaded in two ordinary stock cars, initials and numbers of which were: U. P. Car #36466, Way

*Page-number appearing at foot of page of original certified Transcript of Record.

Bill U. P. #292; and U. P. car #45269, Way Bill U. P. #293, forty-nine head of draft horses and mules, stated average value of $150.00 per head at said city of Grand Island, Nebraska, and delivered the same to the said Union Pacific Company to be transported by said Union Pacific Company over its lines and through its connecting lines of railroad to the city of Spokane, State of Washington, providing in said way bills that said horses and mules should be unloaded, watered, fed, and rested in the cities of Cheyenne, Caldwell, and Walla Walla, and waiving no rights for further proper care of unloading for water, feed and rest of said livestock as provided by law, except releasing 28 hour restriction to not exceed 36 hours in any one period. All freight charges, and charges incidental for said shipment were duly and fully paid by plaintiff, in the sum of $265.00 on each of said cars, making a total of $530.00 freight, together with $49.50 incidental charges made by said common carriers for alleged feed and services on behalf of plaintiff in connection with said shipment, and that said railway [2] company was duly furnished with said bills of lading, a certificate of examination of said livestock in all respects as to health and satisfactory condition for shipment, as is required by law touching interstate transportation of livestock, and furnished a man to accompany said shipment from said Grand Island, Nebraska, to Spokane, Washington.

IV.

That said cars of horses and mules were transported by said first common carrier, Union Pacific Railway

Company, from Grand Island, Nebraska, to its connections with defendant herein, and were delivered into the possession of defendant for transportation over its said lines of road to their destination according to said bill of lading.

V.

That upon said two cars of horses and mules reaching Walla Walla, Washington, four head thereof had died and been removed from the cars by defendant at which place the residue of said horses and mules were tendered to the plaintiff, which tender was refused, except upon condition that plaintiff would use diligence to restore the same to health and realize thereon as hereinafter stated, and upon the same being unloaded at Walla Walla, six thereof were by plaintiff put in charge of veterinary surgeons in the employ of the defendant and all six soon afterwards died. One of the 39 head so taken over by plaintiff, after several weeks of attention, died, and the residue thereof were nursed, fed and cared for until February 24th, 1917, when plaintiff, having before said cars had arrived, advertised a public auction of high class farm horses and mules, offered said 38 head for sale, the public auctioneer refusing to cry the sale, owing to their condition, plaintiff cried the sale, and sold 18 head at prices about covering costs on them, the other 20 head being too weak, sick, and poor to get a bid on when offered, and [3] plaintiff was forced to carry and care for them for months thereafter, until plaintiff was able to dispose of them at sacrificed prices, averaging about $70.00 per head loss thereon. That immediately upon said shipment

reaching Walla Walla in said sick, dying and starved condition, plaintiff made claims against said railway company for damages, the amount of which plaintiff was not then able to state, and not until now was able to state, the full sum thereof, to wit: For the 11 head that died at the rate of $170.00 per head, cost value at Walla Walla, $1,870.00; for damage to twenty of the remaining 38 head at $70.00 per head, $1,400.00; and for the further costs of said care, feed and veterinary services in efforts to restore said 20 head to salable condition, $970.00; making total damages in the sum of $4,240.00.

VI.

That said cars were loaded and turned over to said common carrier from Grand Island, Neb., at 4:30 A. M., Feb. 14, 1917, whence they were transported to Cheyenne, Wyoming, being there fed and reloaded at 2 o'clock A. M. Feb. 16, 1917, whence they were transported to Green River, Wyoming, and there fed and reloaded at 6 P. M. Feb. 17, 1917, whence they were transported to Pocatello, being there unloaded at 9:45 P. M. Feb. 18, 1917, and being there reloaded at 10:30 A. M. Feb. 19th, 1917, whence they were transported to Huntington, being there reloaded at 10:15 A. M. Feb. 21, from whence they were transported to Pendleton, and there unloaded at 11:20 P. M. Feb. 21, and there reloaded at 9:30 A. M. Feb. 22, 1917, from whence they were transported to Walla Walla, arriving there at 4 P. M. Feb. 22, 1917.

VII.

That after leaving Huntington, and prior to the arrival of said two cars of horses and mules at Walla

Walla, four head thereof had died therein and been removed therefrom by defendant [4] and that all of the 45 head remaining were in a very starved, weak, sick and dying condition, so much so that plaintiff refused to receive the same, except under protest, and upon the oral agreement with defendant, through its agent in charge at Walla Walla, whereby plaintiff took over said shipment of horses and mules to take the best care possible of them, with a view of restoring them to life and serviceable condition, until sale could be made at the earliest date, and when sold to report damage and expenses in that behalf, and make claim for loss against the defendant Railway Company, under which agreement plaintiff received 39 head thereof, six head being reduced to such a sick, starved and dying condition as to be beyond saving, and were turned over by plaintiff to defendant's veterinaries at said Walla Walla, whose efforts to save them were unavailing, and soon after each of the said six head died. That one of the 39 head received by plaintiff was so far starved and reduced, that it died some weeks after, in spite of efforts of plaintiff to restore it. That eighteen head were sold on Feb. 24th at about cost and by use of great care and expense over a long period of time plaintiff was able to restore the other 20 head to such condition as to be able to sell them at reduced prices much below actual cost, and eventually disposed of each and all of said 20 head, and necessarily incurred and paid in behalf of same in expense for veterinary services, freight, feed, pasture, and care in the sum of $970.00. That in addition to said expense for

care and restoration to salable condition, plaintiff was forced to sell and did sell said 20 head at an average loss of $70.00 per head below the actual cost and carriage of same at Walla Walla, Washington, amounting to $1,400.00 damage upon said 20 head, damage for said 11 head which died being actual cost and carriage at Walla Walla at $170.00 per head amounting to $1,870.00. [5]

VIII.

That except as above stated from the time said two cars of horses and mules were loaded in said ordinary stock cars at Grand Island, Nebraska, and delivered to plaintiff at Walla Walla, as above stated, the said horses and mules were not unloaded by defendant or any other person or corporation, for water, feed and rest, but were continuously confined in said cars from the said time of being so loaded until their arrival at Walla Walla, said periods of confinement being and covering unlawful periods of more than 28 hours' time and the violation of the laws of the United States and of the State of Washington, in that behalf made and provided pertaining to interstate transportation of livestock; that defendant confined said horses and mules on board said cars and within its train for more than a period of 28 hours between times of loading and unloading same for water, food and rest; that the cars in which said horses and mules were confined for transportation were not cars in which said stock could receive food and water, or affording space and opportunity for said horses and mules confined therein to rest, but were ordinary stock cars, con-

taining no facilities for feeding or watering stock contained therein, and affording no opportunity for stock confined therein to lie down and rest while being transported, all of which was well known to defendant.

IX.

That said defendant or any other carrier transporting said cars of horses and mules were not prevented from unloading same for water, feed and rest, by storm, public enemy, or unavoidable or other adequate causes, although said carriers had yards and conveniences for unloading such shipments of livestock at various points along its right of way and tracks between the aforesaid points of transportation of said livestock. [6]

X.

That plaintiff furnished a man to accompany said shipment from Grand Island, Nebraska, to Walla Walla, Washington, and that requests were made by said attendant of defendants through its agents and employees from time to time to cause said cars containing said horses and mules to be set out of and from defendant's train in order that said horses and mules might be unloaded and given water, feed and rest; that said defendant's agents and employees, though informed of the starved, sick and dying condition of said horses and mules, negligently, wantonly, wilfully and unlawfully refused and neglected to set out said cars from its trains and refused and neglected to unload the said horses and mules from its cars in which they were confined, or permit the plaintiff's said attendant to do so, although the de-

fendant's said agents and servants in charge of said cars and trains in which the same were being transported, well knew the said cars were being negligently, wrongfully and unlawfully held and that said horses and mules were confined therein in transit more than 28 hours, and more than the time allowed by law in which to continuously hold and confine said horses and mules at any one time without being unloaded for water, feed and rest; and also knew that said horses and mules were suffering greatly for the lack of water, feed and rest, and that the same were in great danger of being permanently injured, and of death therefrom; that at the times and occasions upon which said attendant called attention of defendant's agents and employees to the long confinement, and suffering and weak condition of said horses and mules by reason thereof, and by reason of being deprived of water, feed and rest over long and unlawful periods of time, of continuous confinement in transit, the said agents and employees negligently, wantonly, wilfully and unlawfully neglected and [7] continued to refuse to comply with said requests or to in any manner furnish said attendant upon requests with wholesome feed and water for said horses and mules, or to give said attendant an opportunity to get wholesome feed and water for and to said horses and mules, in any manner except as herein stated, and then when furnished by defendant, the quality of feed was of such unwholesome character as to be unfit for said horses and mules in their starved condition; that at different times upon such requests from said attendant, the agents and employees of

defendant would order said attendant to get aboard the train, that the train was about to pull out, and he had better get on or stay on the train as the case might be.

XI.

That by reason of the long delay in the transportation of the said horses and mules and the confining of them in said cars for a longer period than 28 hours during said transportation at a time without unloading the same for water, feed and rest, and by reason of defendant, its agents and employees, failing to furnish wholesome food and water and an opportunity to unload and water, feed and rest said two cars of horses and mules, and by reason of the negligent, wanton, wilful and unlawful acts of the said defendant, its agents and servants in failing, refusing and neglecting to unload said shipment of horses and mules for water, feed and rest after requests or at all, as required by law, except as hereinabove stated, that the said horses and mules were and by reason of said causes and negligence became famished, starved, run down, sick, and suffered greatly from the want of water necessary and proper food, nourishment and rest, and from such causes great disorder, fever, pain, and suffering seized upon said horses and mules, four head thereof dying and being removed from said cars before reaching Walla Walla, as above stated, and seven others dying as above stated, all of the others [8] being damaged and 18 sold as above stated, and 20 others being permanently injured and damaged as the direct results from said negligence, wrongful, unlawful and wilful causes

of defendant, and were eventually partially restored at great cost, and disposed of at great loss as hereinabove stated.

XII.

That at the time said horses and mules were loaded and turned over for shipment at Grand Island, Nebraska, each and every head thereof was carefully inspected and found to be in good healthy condition in all respects as required by law, pertaining to interstate transportation of livestock by common carriers in the United States, certificate of which inspection and healthy condition was furnished to defendant and accompanied the bill of lading issued in connection with said shipment of horses and mules.

XIII.

That the said 20 head of said horses and mules which did not die, and were not sold at Walla Walla, but which from said causes were dangerously sick and permanently reduced in value from the effects of the said lack of water, food and rest, the ravages of the fever and the diseased condition caused therefrom as hereinabove alleged, became run down, weak and poor in flesh, and for a period of several days were so run down, weak and poor in flesh that they could not be shipped on from Walla Walla to Spokane, the final destination, and that after being shipped to Spokane, they continued to be in a weak, poor and totally unable condition to be used or worked or made useful in any manner, and plaintiff was forced to keep and did keep and feed the same as above stated.

XIV.

That in order to save said horses and mules and to reduce the damage sustained by plaintiff as much as possible, and [9] at the earnest request and in compliance with the said agreement of plaintiff with defendant's agent at Walla Walla, plaintiff cared for said horses and mules, paid the costs and expenses thereof, as hereinabove alleged, and made demand upon defendant for the settlement and payment of said damages, all of which defendant has failed, neglected and refused to pay or in any manner settle the same.

XV.

That said shipment of horses and mules were for and well adapted to ordinary farm work and valuable for such purposes, and such horses and mules were in demand in the open market at Walla Walla, Washington, and at Spokane, Washington, at the time said shipment arrived, and had it not been for the negligence, wrongful and unlawful condition of defendants transporting said horses and mules, plaintiff would have realized great profits from the sale of the same in the said market, to wit, not less than $1,260.00, all of which plaintiff has sustained in damages in addition to the sums and specific amounts hereinabove stated. That by reason of the said sick, poor and weak condition, plaintiff was unable to interest anyone in the purchase of said 20 head or any portion thereof until the same had been cared for and fed for a number of months, then only at greatly reduced prices for a permanently impaired animal.

XVI.

That all losses and damages set out and paid for by plaintiff were occasioned by and were the direct results of the negligence, wanton, wilful and unlawful acts of the defendant in its shipment of said horses and mules in confining said horses and mules on board the said cars for a longer period than 28 hours at a time without unloading same for water, feed and rest, and failure and neglect of defendant to furnish plaintiff's attendant with said shipment of horses and mules, with wholesome food and [10] water or an opportunity to procure such food and water, and failure to furnish an opportunity to give and supply the same to said horses and mules, during their said transportation, and had it not been for said negligence, the plaintiff's said horses and mules would not have been injured and the damages herein alleged would not have been sustained by plaintiff.

XVII.

That no part of the damages sustained by plaintiff as herein allowed has in any manner been paid, although demands have been made of defendant for same.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Five Thousand Five Hundred ($5,500.00) Dollars, damages, together with interest, and costs herein.

R. L. EDMISTON,
Atty. for Plf.

State of Washington,
County of Spokane,—ss.

J. B. McGinn, being first duly sworn, on oath de-

poses and says, that he is the plaintiff in the above-entitled action, has read the foregoing complaint, knows the contents thereof, and the same are true, as affiant verily believes.

J. B. McGINN.

Subscribed and sworn to before me this 22d day of June, 1918.

R. L. EDMISTON,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

Filed Aug. 27, 1918, at 3:45 o'clock P. M. Glen B. Creighton, Clerk. By E. E. Burton, Deputy.

Filed in the United States District Court, October 5th, 1918. W. H. Hare, Clerk. S. M. Russell, Deputy. [11]

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*In the Superior Court of the State of Washington, in and for the County of Spokane.*

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

**Order of Removal.**

The petition of the Oregon-Washington Railroad & Navigation Company, the defendant above named, for the removal of said cause from this court to the District Court of the United States, for the Eastern District of Washington, Northern Division, coming

on regularly for hearing, and said defendant and petitioner having filed herein its said petition and presented to the Court a good and sufficient surety, and it appearing that said action is a proper action for removal to the District Court of the United States for the Eastern District of Washington, Northern Division, and that said petitioner has presented its said petition for removal within the time, and in the manner prescribed by law, and that due notice has been given to the plaintiff herein of the time when said petition was to be presented to the Court;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED, that said petition and the bond herein be and the same are hereby accepted and said bond is hereby approved; and,

IT IS FURTHER ORDERED, that said Court proceed no further in said action, and that said action is hereby removed to the District Court of the United States, for the Eastern District of Washington, Northern Division, and that the Clerk of the Court proceed and prepare a transcript of the record in said [12] cause as same is now on file in his office.

Done in open court this 14th day of September, 1918.

HUGO E. OSWALD,
Judge.

Filed Sep. 14, 1918, at 9:55 o'clock A. M. Glen B. Creighton, Clerk. E. E. Burton, Deputy.

Filed in the United States District Court, October 5th, 1918. W. H. Hare, Clerk. S. M. Russell, Deputy. [13]

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*In the United States District Court for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILWAY & NAVIGATION COMPANY,

Defendant.

**Amended Bill of Particulars.**

Plaintiff complies with the order of the Court granting defendant's motion for amended bill of particulars now here serves and files its amended bill of particulars as follows, to wit:

I. In answer to paragraphs two and four of defendant's motion for bill of particulars herein says that the expense incurred and paid by plaintiff for care, feed and veterinary made necessary by the reason of the sick and damaged condition of the horses and mules, is as follows: 1. Veterinary services, $135.40; 2. Drug and medicine bill, $90.00; 3. Feed bill incurred at Walla Walla, $115.00; 4. Feed and yardage at Spokane, $146.25; 5. Pasturage, $75.00; 6. Feed, special care and attention given at 217 Indiana Ave., Spokane, $408.35, which items constitute $970.00.

II. In answer to paragraph six of said motion as to between what places and upon what dates said horses and mules were confined in cars for more than 28 hours without unloading for feed, water and rest, plaintiff for amended answer states as follows, to wit: Said horses and mules were held in the cars for more than 28 hours between Cheyenne and Green River, Wyoming, on the 16 and 17 days of February, 1917; and between Green River, Wyoming, and Pocatello, Idaho, on the 17, 18 and 19 days of February, 1917; and between Pocatello, Idaho, and Huntington, Oregon, on the 19, 20 and 21 days of February, 1917.

III. For amended answer to paragraphs seven and eight of said motion plaintiff states that plaintiff's attendant in charge of said horses and mules made request upon the conductor in charge of the freight train in which said cars were being conveyed; and that specific request was so made to the conductor requesting that said cars of horses and mules be set out for feed, water and rest at Glens Ferry, Idaho, at Nampa, Idaho, at Caldwell, Idaho, and at Payette.

IV. In answer to paragraph nine in said motion plaintiff states that the place or places where quality of hay feed, that was furnished by the defendant and fed to said horses and mules that was of an unwholesome character and in what respect was unwholesome and unfit for horses and mules, was at Pocatello, Idaho. The hay there furnished and fed being molded and partly decayed and mixed with noisome weeds that were molded and partly decayed and unfit for horses and mules to eat in any condition and the hay was decayed to such an extent as to be unfit for horses

and mules under any circumstances, and the water furnished by defendant to be used and fed to and that was given to and drank of by said horses and mules at Pocatello, was also bad, impure and unfit for horses and mules to drink under any condition.

That a similar condition obtained with reference to the hay furnished by defendant and fed to said horses and mules at Huntington, Oregon.

R. L. EDMISTON,
Attorney for Plaintiff. [14]

State of Washington,
County of Spokane,—ss.

J. B. McGinn, being duly sworn, on oath says that affiant is plaintiff in the above-entitled action, has read the foregoing amended bill of particulars and that the same are true as affiant verily believes.

J. B. McGINN.

Subscribed and sworn to before me this 11th day of February, A. D. 1919.

R. L. EDMISTON,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Filed in the United States District Court, February 19th, 1919. W. H. Hare, Clerk. [15]

*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

**Demurrer.**

Comes now the defendant in the above-entitled action, and demurs to the complaint of the plaintiff herein, for the reason and upon the ground that said complaint does not state facts sufficient to constitute a cause of action against this defendant.

A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

Filed in the United States District Court, February 24th, 1919. W. H. Hare, Clerk. [16]

*In the United States District Court, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILWAY & NAVIGATION COMPANY,

Defendant.

**Order Overruling Demurrer.**

The above-entitled cause coming regularly on for hearing this 3d day of March, 1919, upon demurrer of defendant to the complaint herein; R. L. Edmiston, attorney, appearing for the plaintiff, and W. S. Gilbert, attorney appearing for defendant, and demurrer being duly submitted to the Court, and the Court being advised in the premises, it is now here ordered that the demurrer of defendant to the complaint herein be and the same is now here overruled.

It is further ordered that defendant be and is now here given two (2) weeks from March 3d, 1919, in which to answer the complaint herein.

Done in open court this 4th day of March, A. D. 1919, by the Court.

FRANK H. RUDKIN,
Judge.

Filed in the United States District Court, March 4th, 1914. W. H. Hare, Clerk. By H. J. Dunham, Deputy.

O. K.—W. S. GILBERT. **[17]**

*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

**Answer.**

Comes now the above-named defendant and answering the complaint of the plaintiff herein, admits and denies as follows:

I.

Admits the allegations contained in paragraph one of said complaint.

II.

Admits the allegations contained in paragraph two of said complaint.

III.

Answering paragraph three, defendant admits the allegations therein contained, except that plaintiff waived no rights for further proper care or unloading said stock for water, feed and rest, which allegation defendant denies.

IV.

Admits the allegations contained in paragraph four of said complaint.

V.

Answering paragraph five of said complaint, this

defendant admits that when said cars of horses and mules reached Walla Walla, Wash., several head had died and that many of said horses and mules were suffering from sickness *of* disease; that the same were unloaded **[18]** at Walla Walla by the plaintiff and that several thereof died, but denies that it has any knowledge or information sufficient to form a belief as to the other allegations therein contained, and therefore denies the same, and particularly denies that the plaintiff realized only $70.00 per head for said horses which he sold; particularly denies that the horses that died were of the value of $170.00 per head, or any other sum in excess of $150.00; denies that the remainder of the horses were damaged to the extent of $70.00 per head or in any other sum; denies that plaintiff expended for veterinary services the sum of $970.00 or any other sum.

VI.

Answering paragraph six defendant admits that the said horses were loaded and turned over to the Union Pacific Railway Company at Grand Island, Neb., on February 14th, 1917, at 5:30 A. M., and admits that they were thence transported to Cheyenne, Wyoming, where they were unloaded, rested, fed and reloaded at 2 A. M. on February 16th, 1917; admits that they were from there transported to Green River, Wyoming, where they were unloaded, rested, fed and reloaded at 5:15 P. M., February 17th, 1917; admits that they were from there transported to Pocatello, Idaho, where they were unloaded at 9:40 P. M., February 18th, 1917, and were reloaded at 10:20 A. M., on February 19th, 1917;

admits that they were then transported to Huntington, Oregon, where they were unloaded, rested, fed and reloaded at 10:45 A. M., February 21st, 1917, admits that they were then transported to Pendleton, Oregon, where they were unloaded at 11:50 P. M., on February 21st, 1917, and were reloaded at 9:30 A. M., on February 22d, 1917; admits that they were then transported to Walla Walla, where they were unloaded at 4 P. M., February 22d, 1917.

VII.

Answering paragraph seven defendant admits that after leaving Huntington, Oregon, and prior to the arrival of said horses **[19]** and mules at Walla Walla, 3 head thereof had died and had been removed from the cars; admits that said horses were probably in a sick condition, but denies the other allegations, matters and things contained in said paragraph seven, and particularly denied the value of and damage to said horses as hereinbefore set forth.

VIII.

Answering paragraph eight, defendant denies the same, and each and every allegation therein contained, except that said horses and mules were confined for a period of more than twenty-eight hours without water, feed or rest on the written consent of the keeper in charge of said stock, between Grand Island, Neb., and Cheyenne, Wyoming, being confined for a period of thirty-three hours and twenty minutes; and between Cheyenne, Wyoming, and Green River, Wyoming, being confined for a period of thirty-three hours and ten minutes; and between

Pocatello, Idaho, to Huntington, Oregon, being confined for a period of thirty hours.

IX.

Answering paragraph nine, defendant admits the allegations therein contained.

X.

Answering paragraph ten of said complaint, defendant admits that the plaintiff furnished a man to accompany said shipment, but denies the other allegations contained in said paragraph ten, except that said horses and mules were confined between certain towns as hereinbefore set forth, for more than twenty-eight hours, but on the written consent and request of said keeper.

XI.

Answering paragraph eleven defendant denies each and every allegation, matter and thing therein contained.

XII.

Answering paragraph twelve, defendant admits that said horses and mules were inspected, and that a certificate of inspection **[20]** was furnished as required by law, but denies the other allegations therein contained.

XIII.

Denies that it has any knowledge *of* information sufficient to form a belief as to the allegations contained in paragraph thirteen of said complaint, and therefore denies the same.

XIV.

Admits the allegations contained in paragraph fourteen of said complaint.

XV.

Answering paragraph fifteen of said complaint, defendant denies each and every allegation therein contained, except that said shipment of horses and mules were adapted to ordinary farm work and were valuable for such purpose.

XVI.

Denies the allegations contained in paragraph sixteen of said complaint.

XVII.

Admits the allegations contained in paragraph seventeen of said complaint.

AFFIRMATIVE DEFENSE.

For a further, separate and affirmative defense to plaintiff's complaint herein, defendant alleges:

I.

That at the time of the shipment of said horses and mules as set forth in plaintiff's complaint, the said Union Pacific Railway Company, mentioned in plaintiff's complaint, for itself and on behalf of its connecting carriers, including the defendant herein made and entered into a contract in writing with said plaintiff, known as a livestock contract, in form and substance approved by the Interstate Commerce Commission, which contract recited that for **[21]** the purpose of said shipment said horses and mules should be held and taken to be of the value of $150.00 per head, and further provided among other things, as follows:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the bases of the value of the stock at the time and place of shipment under this contract."

Said contract also contained the following provision:

> "The shipper will at his own risk and expense, load, unload, care for, feed and water the stock until delivery of the same to consignee at destination, and will furnis*t* to go with the stock for that purpose one or more attendant according to the rules of the carrier. If the shipper fails to furnish such attendant or if the latter neglects to perform said duties, whatever shall be done by the carrier in respect to the handling and care of the stock in transit, shall be considered as done by it at the request and as the representative of the shipper and at the risk and expense of the shipper."

II.

Defendant alleges that pursuant to the terms of said contract the plaintiff did furnish an*d* attendant to accompany said shipment *to* livestock and said livestock was from time to time and within the periods required by law and at the times and within periods required by law, and at the times and places suggested by said attendant, where facilities would permit, unloaded for rest, water and feed for the periods required by law, all of which was done under the direction and supervision of said keeper; that said horses and mules were confined in cars for a period of more than twenty-eight hours between Grand Island, Neb., and Cheyenne, Wyoming, between Cheyenne and Green River, Wyoming, and between Pocatello, Idaho, and Huntington, Oregon, but in no case to exceed thirty-six hours, and in each

instance were so confined at the written request and direction of plaintiff's attendant in charge of said shipments.

III.

That between Huntington, Oregon, and Walla Walla, Wash., said horses and mules developed some disease or malady or ailment, which caused several of them to die and made the remainder sick for a period of time unknown to this defendant, but defendant alleges [22] that said sickness or malady or disease was in no manner due to any acts of this defendant, but was due to some cause or causes to this defendant unknown.

IV.

That because of said sickness or disease said horses and mules were not transported to Spokane, Washington, as provided in the original contract but at the special request of the plaintiff were unloaded and delivered to the plaintiff at Walla Walla, Wash.

WHEREFORE, having fully answered, this defendant prays that plaintiff's complaint may be dismissed and that it may have and recover its costs and disbursements herein expended.

A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

W. S. Gilbert, being first duly sworn, on oath deposes and says, that he is one of the attorneys for the above-named defendant, and makes this verification in its behalf for the reason that none of the

officers of said defendant corporation are present within the county of Spokane, and capable of making said verification, that he has read the foregoing answer, knows the contents thereof and that the same is true as he verily believes.

W. S. GILBERT.

Subscribed and sworn to before me this 17th day of March, 1919.

S. H. BOYLES,
Notary Public, Residing at Spokane, Spokane County, Washington.

Filed in the United States District Court, March 17th, 1919. W. H. Hare, Clerk. **[23]**

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*In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

**Reply.**

Plaintiff for reply to the answer of defendant to the complaint herein states and alleges as follows, to wit:

I. Denies each and every allegation and affirma-

tive matter stated and alleged in paragraph VIII of said answer; and specially denies that any written consent was given or obtained by defendant from plaintiff or from any person authorized to so act for plaintiff permitting or authorizing defendant to keep said horses and mules confined for any one period of more than 28 hours without unloading for water, feed and rest and alleges that if any such writing was obtained it was without authority of plaintiff, without consideration, without mutuality, contrary to law, a fraud in law and in fact, of no force and effect whatever and in no manner binding upon this plaintiff; and specially denies that the time in which said horses and mules were confined in cars without unloading for feed, water and rest was more than 36 hours between two or more of the places therein named in the said paragraph VIII, to wit: Between Cheyenne, Wyoming and Green River, Wyoming and between Green River, Wyoming and Pocatello, Idaho and between Pocatello, Idaho and Huntington, Oregon.

II. Denies each and every affirmative statement and allegation in paragraph X of the answer of defendant.

III. Denies each and every other affirmative matter and allegation contained in the answer of defendant herein. **[24]**

AFFIRMATIVE REPLY.

For reply to affirmative answer and defenses of defendant, to the complaint herein plaintiff admits, denies and alleges as follows:

I. Admits that a shipping contract of bill of lading was issued by the Union Pacific Railroad Company on behalf of itself and its connecting carriers including defendant herein, which instrument plaintiff may have been required to sign and did sign, but denies each and every other allegation in said paragraph set forth, and alleges that if the language therein quoted with reference to the value of the stock at the time and place of shipment is contained in said bill of lading for shipping of said horses and mules same was therein without the consent of plaintiff, is therein without consideration, is without mutuality, contrary to law, a fraud in law and in no manner binding upon plaintiff; and further alleges that if the language quoted in said paragraph with reference to shippers own risk as to unloading and loading, care, feed and water of said horses and mules during *transient* is contained in the said bill of lading for shipping of said horses and mules the same was not consented to by plaintiff, is without consideration, without mutuality, contrary to law, and of no force and effect against plaintiff, that plaintiff never assumed or released any risk or duty with reference to the shipment of livestock and furnishing of safe yards and facilities for unloading, and furnishing of wholesome feed and water at such yards. And further denies that plaintiff ever consented that such duties and services performed by defendant would be deemed to have been done at the request of plaintiff and as the representative of plaintiff and at the risk of plaintiff. And further alleges that for all such care, service, feed and pro-

visions furnished by defendant, plaintiff paid defendant for same in all respects as plaintiff paid for the freight upon said shipment of two cars of horses and mules. **[25]**

II. For reply to paragraph II of defendant's affirmative answer plaintiff admits that plaintiff furnished an attendant to accompany said shipment of two cars of horses and mules and admits that said horses and mules were confined in the cars for continuous periods of more than 28 hours between Grand Island, Nebraska and Cheyenne, Wyoming, between Cheyenne, Wyoming and Green River, Wyoming, between Green River, Wyoming and Pocatello, Idaho and between Pocatello, Idaho and Huntington, Oregon, and denies each and every other allegation, matter and thing stated and set forth in said paragraph; and specially denies that said horses and mules were so confined between said places and for said periods at the written request of plaintiff's attendant accompanying said shipment; and alleges that if any such writing existed same was without authority from plaintiff and without the notice and knowledge of plaintiff in any manner without consideration, contrary to the interest of plaintiff and wholly in the interest of defendant, a fraud in law and in no manner binding upon this plaintiff all of which was then and there after well known to defendant.

III. Answering paragraph III of defendants affirmative answer, plaintiff admits that between Huntington, Oregon, and Walla Walla, Washington, said horses and mules developed some disease, mal-

ady or ailment from which several died and the remainder were sick for a long period of time, and denies each and every allegation, matter and thing stated in said paragraph and alleges that said illness appeared first between Pocatello, Idaho, and said Huntington, Oregon, and continued thereafter and further alleges that cause of said illness, death and damage was the negligence, confinement of said horses and mules in cars in transit for periods longer than 28 hours and the unwholesome character of the feed and water supplied by defendant, as stated in the complaint herein. **[26]**

IV. For answer to paragraph IV of said affirmative answer, plaintiff admits that by reason of said sickness and deaths said horses and mules were not continued in transit to their destination at Spokane Washington, and were unloaded at Walla Walla Washington, but denies each and every other allegation, matter and thing stated in said paragraph.

WHEREFORE plaintiff prays that defendant take nothing and that plaintiff have judgment against defendant according to the prayer of the complaint herein.

R. L. EDMISTON,
Attorney for Plaintiff.

State of Washington,
County of Spokane,—ss.

J. B. McGinn, being duly sworn, on oath says, that he is the plaintiff in the above-entitled action, that he has read the foregoing reply to the answer of defendant, knows the contents thereof and the same are true as affiant verily believes.

J. B. McGINN.

Subscribed and sworn to before me, this 22 day of March, A. D. 1919.

R. L. EDMISTON,
Notary Public for the State of Wash., Residing at Spokane, Washington.

Filed in the United States District Court, March 28th, 1919. W. H. Hare, Clerk. Harry J. Dunham, Deputy. [27]

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*In the United States District Court, of the District of Eastern Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILWAY & NAVIGATION COMPANY,

Defendant.

**Stipulation in re Livestock Contract.**

IT IS NOW HERE STIPULATED by and between plaintiff and defendant, through their respective attorneys herein:

I.

That the Livestock Contract hereto attached is a duplicate original of the contract issued for the shipment of the horses and mules referred to in the complaint herein; that the same was signed by plaintiff and the name J. B. McGinn is in plaintiff's handwriting; that the endorsements on the back of said contract were made in due course of transit by the

agents and servants of the Union Pacific Railway Company and of defendant, and that defendant herein is a part of the Union Pacific System of Railways.

II.

That the second car constituting the sale shipment of horses and mules referred to in the complaint herein, had Waybill or Livestock Contract No. 292 and the car being U. P. No. 36,466, was issued at the same time and place containing the same language, figures and statements, and signed J. B. McGinn & Co., shipper, by G. F. Brandell, shipper's agent in the handwriting of said Brandell, and was so signed in the presence of plaintiff and with plaintiff's consent and that the same is in all other respects the same as the Livestock Contract hereto attached; that sale contract also contained like endorsements on the back made by the agents and servants of the said Union Pacific Railway Co., and of defendant.

III.

That this stipulation may be introduced in evidence by either party hereto and that said contract attached and this stipulation may constitute and may be considered in lieu of the Livestock Contract for the second car of said shipment, the original duplicate of said contract having been lost.

IV.

It is further stipulated that each party hereto reserve the right to object to the legal force and effect of said contracts or any portion thereof, or any endorsements thereon, and to introduce evidence tending to overcome same or any part thereof or any endorsements thereon.

In Witness Whereof parties hereto, through their respective attorneys, have hereunto set their hand this 17th day of June, A. D. 1919.

R. L. EDMISTON,
Attorney for Plaintiff,
HAMBLEN & GILBERT,
Attorney for Defendant.

Filed in the United States District Court, June 26th, 1919. W. H. Hare, Clerk. [28]

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*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,

Defendant.

**Verdict**

We, the jury in the above-entitled cause, find for the plaintiff, and assess the amount of his recovery at the sum of $1,870.00.

JOHN T. LITTLE,
Foreman.

Filed in the United States District Court, June 26th, 1919. W. H. Hare, Clerk. [29]

*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

**Judgment.**

This case coming regularly on for hearing upon the motion of the defendant for judgment setting aside the verdict of the jury heretofore rendered herein and dismissing the above-entitled action in accordance with stipulation made and entered into between the respective parties in the above court prior to the submission of said cause to the jury, and the Court having heard the argument of counsel and taken said cause under advisement and filed herein its written opinion and decision,—

IT IS ORDERED, that the verdict of the jury in the above-entitled action heretofore rendered on June 26th, 1919, in favor of the plaintiff and against the defendant, be and the same is hereby set aside; and,

IT IS HEREBY ORDERED AND ADJUDGED, that notwithstanding said verdict of the jury, plaintiff's complaint herein be dismissed and that the defendant have and recover its costs and disbursements herein expended. To all of which plaintiff excepts and exception allowed.

Done in open court this 26th day of August, 1919.

FRANK H. RUDKIN,
District Judge.

Filed in the United States District Court, August 28th, 1919. W. H. Hare, Clerk. H. J. Dunham, Deputy. [30]

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*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED, that heretofore, to wit, on the 24th day of June, A. D. 1910, one of the days of the April, 1919, term of the United States District Court for the Eastern District of Washington, Northern Division, before Hon. Frank H. Rudkin, Judge of said court, presiding, and a jury, this cause came on for trial on the pleadings duly filed herein.

This was an action at law to recover damages for loss and injury to certain horses and mules shipped from Grand Island, Nebraska, on contract by the Union Pacific Railway Company to transport same over its railway system to Spokane, Washington, of which system defendant is a part.

Plaintiff appeared in person and by his attorney, R. L. Edmiston, Esq., and the defendant appeared by Messrs. Hamblen and Gilbert, its attorneys, and a jury being duly impaneled and sworn to try the cause, the following proceedings were had and testimony taken.

An opening statement to the jury was made for plaintiff by R. L. Edmiston, and statement *of* behalf of defendant reserved.

**Testimony of J. B. McGinn, in His Own Behalf.**

(By Mr. EDMISTON.)

Mr. J. B. McGINN, plaintiff, being duly sworn, testified as follows:

I am the plaintiff in this action and am engaged in [31] the business of buying and selling horses with barns at 217 Indiana Street, Spokane, Washington, and have been in the business for more than twenty years, and was so engaged in February, 1917. About the middle of February, 1917, I shipped 30 mules and 19 horses—49 head—in two common stock cars, over the Union Pacific Railroad System from Grand Island, Nebraska, to Spokane, Washington.

The contract of shipment being made with the Union Pacific Railroad Company upon the ordinary live-stock railway contracts then in use.

Yes, that is the contract, and that is my signature thereto.

The contract for the second car was the same as the said Exhibit I.

The COURT.—I suppose the contracts are duplicate.

(Testimony of J. B. McGinn.)

Mr. GILBERT.—We stipulated that one may be omitted as they are both alike.

Mr. EDMISTON.—I offer this contract in evidence as Plaintiff's Exhibit I, and the stipulation as Plaintiff's Exhibit II.

The COURT.—They may be admitted.

Said exhibit I and exhibit II are in words and figures as follows, to wit:

**Plaintiff's Exhibit I.**

Form 5983.

Original.

Union Pacific System.

UNION PACIFIC RAILROAD COMPANY.
OREGON SHORT LINE RAILROAD COMPANY.
OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY.

LIVESTOCK CONTRACT.

This contract made and entered into in duplicate this 13th day of February, 1917, at Grand Island, Nebraska, station by and between J. B. McGinn, of Grand Island, Nebraska, hereinafter called the shipper, of the first part, and the Union [32] Pacific Railroad Company, hereinafter called the carrier, of the second part.

WITNESSETH: That for and in consideration of —— subject to minimum weights or percentage increase of decrease for cars of varying length, as shown in the published tariffs classifications and rules, the carrier accepts for TRANSPORTATION ONE car loaded with mules (numbers of waybills, initials and

numbers of cars are noted in the left hand margin hereof). Consigned from Grand Island, Neb., to J. B. McGinn, at Spokane, Washington, upon the following terms and conditions, viz:

WHEREAS: The classifications and tariffs under which this agreement is made require that for the purpose of applying the la*a*wful rate of freight the shipper must declare, whether the shipment is ordinary livestock, and if so, specify the kind *of* kinds of animals, and if not, must declare the kind and value of each animal. (The term ordinary livestock, includes all cattle, swine, sheep, goats, horses, mules, except such as are chiefly valuable for breeding, show, racing, or other special uses.)

NOW, therefore, for the purpose of enabling the carrier to apply the lawful rate as provided in its tariffs, the shipper makes the following declaration as to said shipment:

NOW, THEREFORE, IT IS AGREED between the parties as follows:

1. Except as otherwise provided by statute law, the carrier undertakes to transport said shipment only over its own line, and acts only as the agent of the shipper with respect to the portion of the route beyond its own line. No carrier shall be liable for damages for loss, death, injury or delay to said animals, of any thereof, not caused by it, but nothing contained in this contract shall be deemed to exempt the initial carrier in case of a through interstate transportation from and liability for loss, death, damage *of* injury caused by [33] it or any common carrier, railroad or transportation company to which

the livestock may be delivered under this contract. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the stock at the time and place of shipment under this contract.

2. The carrier does not undertake to transport said animals by any particular train, or within any particular time, or in time for any particular market.

3. The shipper will, at his own risk and expense, load, unload, care for, feed and water the stock, until delivery of same to consignee at destination, and will furnish to go with the stock for that purpose, one or more attendants, according to the rules of the carrier, and if the shipper fails to furnish such attendant, or if the latter neglects to perform said duties, whatever shall be done by the carrier in respect to the handling and care of the stock in transit, shall be considered as done by it at the request and as the representative of the shipper, and at the risk and expense of the shipper.

4. The lien of the carrier and right of possession as security for its charges and expenses, if any, in the transportation, care and handling of the shipment, shall continue and remain in the carrier, unaffected by any stoppage in the stock or removal thereof from the train or yards of the carrier for resting, feeding, grazing or other purposes.

5. Unless notice of claim for shrinkage, detention, delay, loss or death of, or damage or injury to said livestock is presented in writing to the station agent of the carrier at the point of delivery, or at point of origin, within ninety days from the unloading of said

stock at destination, or in case of failure to make delivery, then within ninety days after a reasonable time for delivery has elapsed, and such [34] notice be supplemented by shipper within four months from said date of unloading at destination or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, by filing with said agent definite claims in writing specifying character and amount of claim; such claim shall be deemed to have been waived, and each carrier participating in the service performed or called for by this contract shall be discharged from liability; provided, however, that if loss, damage or injury complained of was due to delay or damage caused or contributed to by the carrier, or its employees, while being loaded or unloaded, or if damaged in transit by carelessness or neglect of the carrier, or its employees, then no notice of claim of filing of claim shall be required as a condition precedent to recovery.

6. All actions to recover any claims or damages, shall be commenced within two years after the completion of the trnasportation herein provided for, or in case of failure to make delivery, then within two years after a reasonable time for delivery, has passed, and a failure to comply with any of the provisions of this clause of the contract shall be a bar to the recovery of any and all such claims of damages, any statute of limitations to the contrary notwithstanding.

7. No officer, agent or employee of any character, may under any circumstances, alter, change or mod-

ify, or agree to alter, change or modify, any of the terms of this contract.

M. G. MARTIN: Witness.

Witness my hand, J. B. McGINN.

UNION PACIFIC RAILROAD COMPANY,

By W. H. LOUETS.

WAYBILL NO. 293, NO. U. P. 45,269.

Feed at Cheyenne, Caldwell and Walla Walla.

36 Hr. release. **[35]**

Man in charge ——.

**Plaintiff's Exhibit II.**

*In the United States District Court of the District of Eastern Washington, Northern Division.*

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RY. AND NAVIGATION COMPANY,

Defendant.

STIPULATION.

IT IS NOW HERE STIPULATED by and between plaintiff and defendant, through their respective attorneys herein:

I.

That the livestock contract hereto attached is a duplicate original of the contract issued for the shipment of the horses and mules referred to in the complaint herein; that the same was signed by plaintiff and that the name J. B. McGinn is in plaintiff's handwriting; that the endorsements on the back of said

contract were made in due course of transit by the agents and servants of the Union Pacific Railway Company and of defendant, and the defendant herein is a part of the Union Pacific System of Railways.

II.

That the second car constituting the said shipment of horses and mules referred to in the complaint herein had Way-bill of Livestock Contract No. 292 and the car being U. P. No. 36,466, was issued at the same time and place containing the same language, figures and statements, and signed J. B. McGinn & Co., shipper, by G. F. Brandell, shipper's agent, in the handwriting of said Brandell, and was so signed in the presence of plaintiff and with plaintiff's consent and that the same is in all other respects the same as the livestock contract hereto attached; that said contract also contained like endorsements [36] on the back made by the agents and servants of the said Union Pacific Railway Company and of defendant.

III.

That this stipulation may be introduced in evidence by either party hereto and that said contract attached and this stipulation may constitute and may be considered in lieu of the livestock contract for the second car of said shipment, the original duplicate of said contract having been lost.

IV.

It is further stipulated that each party hereto reserves the right to object to the legal force and effect of said contracts, or any portion thereof, or any endorsements thereon, and to introduce evidence tend-

(Testimony of J. B. McGinn.)

ing to overcome same or any part thereof or any endorsements thereon.

IN WITNESS WHEREOF parties, hereto through their respective attorneys, have hereunto set their hands this 17th day of June, A. D. 1919.

R. L. EDMISTON,
Attorney for Plaintiff.
HAMBLEN & GILBERT,
Attorney for Defendant.

WITNESS.—I bought the horses and mules in Grand Island, Nebraska, on the 13th of February, 1917. They were all in sound and healthy condition and were duly inspected as required by law for shipping of livestock and certificate of inspection furnished the railroad company. I hired Mr. George Brandel to accompany the shipment. I never saw the horses and mules again until at Walla Walla, Washington, about nine days later, and then only 45 head of them. I received them and paid the freight under protest. (Tr. 4.)

Q. State what was said and done between you and the agent at Walla Walla, when you took over the horses.

Mr. GILBERT.—I object as immaterial.

The COURT.—Objection sustained.

Mr. EDMISTON.—Exception. (Tr. 7.) [37]

WITNESS.—At Walla Walla I found them in very poor condition. Four of them never arrived and the others were in very bad condition. Six others died that night and one mule died later. (Tr. 7.) The others were doctored up and cared for at Walla

(Testimony of J. B. McGinn.)

Walla, where I sold 18 head of the best and claimed no damages for them, and then shipped the 21 remaining head to Spokane—one being a sick mule that died afterwards.

I paid special expenses as follows:

Dr. Thorpe, veterinary.....$20.75

Dr. Thorpe treated them for both the railroad company and myself.

Washington State Vet. College of Spokane for services.....$110.40

For removing dead animals at Walla Walla..$ 5.00

Paid for drugs and medicines.....$ 35.00

Eleven head died all together. (12) Nine of the dead were one each from matched teams.

I kept the 20 head at Spokane for about six months, treating and caring for them at an extra expense of $145.00 and for special pasturage $75.00 (14).

I sold the 20 head for from $50.00 to $125.00 per head; they averaged about $100.00. The market value of them in the spring of 1917 in Spokane, in sound condition, was $225.00 a head on an average. (Tr. 15.) From my experience in shipping, when I first saw these horses and mules at Walla Walla, I knew that they had got some poor feed or poor water somewhere and I at once gave them the very best hay and water—a little at a time—except those that were in the hospital in care of the defendant, which died that night after their arrival. I do not know what was done for them.

From the way they stood and the way bloody matter [38] was coming from them it appeared to me

(Testimony of J. B. McGinn.)

that they had been fed bad musty and moldy hay. (Tr. 19.) I had reasons and instructed my man not to feed at Pocatello, if possible.

I paid the freight on the 21 head from Walla Walla to Spokane which was $61.00—after remaining about six days at Walla Walla.

Cross-examination.

(By Mr. GILBERT, for Defendant.)

Mr. McGINN further testifies:

I have been in the horse business continuously since 1884 and continually bought and sold horses and mules. During the last three years I have shipped more horses and mules than any man in the United States; except one. (Tr. 22.)

I kept book accounts showing my expenses in caring for the sick horses and mules and had them in my grip when I went to Walla Walla to see some lawyers to interest them in the case, and my grip was lost or stolen at the hotel and I have never been able to recover it. I bought hay for them, paid a man for taking care of them, paid the medicine and veterinary bills—the gross amount making $408.00. I approximate the cost for care and feed at 65¢ a day. (Tr. 25.)

One of the 20 head sold for $50.00, some for $80.00, and they averaged about $100.00 a head. The account of the receipts from sale was also in the lost grip. I sold 18 head in Walla Walla and brought the 21 head to Spokane—one of which afterwards died.

Witness excused.

(Testimony of George Brandel.)

Mr. EDMISTON.—At this time I want to read to the jury and into the records the facts as admitted in the pleadings so as to shorten the examination of the witnesses. [39]

The COURT.—I will embody that in an instruction that will cover it.

Mr. EDMISTON.—I would prefer to have it read in.

The COURT.—That is already in the record.

EXCEPTION.

**Testimony of George Brandel, for Plaintiff.**

(By Mr. EDMISTON.)

GEORGE BRANDEL, being duly sworn, testified as follows:

I reside at Reliance, Nebraska, and my business is buying and selling horses and has been for about 24 years. I was the caretaker with the shipment of two cars of horses and mules belonging to plaintiff McGinn, from Grand Island, Nebraska to Spokane, Washington—leaving Grand Island early in the morning of February 14, 1917. I came through with the shipment all the way to Walla Walla, Washington. The first stop for feed and rest was at Cheyenne, Wyoming, and the second at Green River, Wyoming, and the third at Pocatello, Idaho. We got in to Pocatello around nine or ten o'clock in the evening. The horses and mules appeared to be dry and hungry—they had the hay in the feed racks and this hay was very bad; it was moldy and dusty and kind of rotten—it was unfit for animals to eat. I asked the

(Testimony of George Brandel.)

man in charge if they had no better hay than that, and he said "No, sir." I spoke to him about getting something better than that and he said, "It was either feed that or snowballs." (Tr. 31.) The feed was timothy hay and a kind of swamp grass and willows and a little brush in it. Swamp grass and timothy with willows and weeds mixed in it. The weeds were kind of musty and it was moldy just the same as the hay. The feed was in the racks when I got there. It is customary to have the feed in the racks at some feed yards, and others it is not. My time was up and I could not get by Pocatello without stopping for feed and rest. I did **[40]** not order feed at Pocatello.

Mr. McGinn advised me not to stop at Pocatello if I could possibly get by to the next feeding place.

The water was not very good at Pocatello—kind of muddy, kind of riley. (Tr. 34.)

From Pocatello we run to Huntington, Oregon, for the next stop. At Huntington we were held on the track, I should judge, three of four hours before being switched to the stockyards and unloaded. At Glenn's Ferry, before reaching Huntington, we stopped on the sidetrack about three hours and I found the horses in very bad condition. They were scouring and looking kind of bad and I asked the conductor if he could not set us out.

Mr. GILBERT.—I move to strike out any conversation about these other matters or any request because they are not set out in the bill of particulars.

The COURT.—Where you are specifying parti-

(Testimony of George Brandel.)

cular officers of agents upon whom the demand was made you will be limited in your proof to those mentioned in the bill of particulars.

Mr. EDMISTON.—Exception. (Tr. 36.)

I made request of the conductor in charge before reaching Huntington, along somewhere about Weiser. I said to the conductor that my time was about up so as to see if we could be taken care of at a station along there where I could get feed and water, but he could not give me any stop. (Tr. 36.) At Huntington the horses and mules were in very bad shape—all guanted up and scouring. They were put in the yard and fed. They didn't eat very good. We had one black horse die there in the yard. This horse was all straightened out and in a staggering condition, and would not eat very much and practically **[41]** just dropped dead. When I saw him last he was standing up and in about 30 minutes the stockyard man said he was dead. All the horses looked gaunt just like the one that died, only the rest of them was not as sick as this horse was at that time in Huntington.

After leaving Huntington we next fed at Pendleton, Oregon. There was one mule dead in the car and the next morning there were three others dead in the yard. We left Pendleton at 9:30 A. M. the morning of February 22d and reached Walla Walla that afternoon, and I met Mr. McGinn at the stockyards in Walla Walla. I had written him from Huntington of the condition of the horses. At Walla Walla the horses and mules were still scouring

(Testimony of George Brandel.)

and were drawed up and in a staggering condition and looked kind of stupified.

Cross-examination.

(By Mr. GILBERT.)

Witness BRANDEL further testifies:

I have been in the stock business about 24 years on my own account and for others. I made the trip with the two cars from Grand Island to Walla Walla at the request and in the employ of Mr. McGinn, the plaintiff. I have not been regularly in the employ of Mr. McGinn—had never made a trip for him before. I had made trips with shipments before this trip. I have been clear to New York City with stock from Grand Island, Nebraska.

Mr. McGinn knew that I was a horse man and I called on him and he employed me to make the trip. (Tr. 43.) It was my duty, as man in charge, to attend and be present at feed time and see that they got proper feed and water. Everything was in good shape up to the time we reached Pocatello. I got off at Pocatello, when the train pulled in, and went up town to get myself something to eat and then went up to the yard, two miles **[42]** out of town, to see the horses; and I want the jury to understand that when I got there I saw the feed was timothy and swamp grass, and weeds, and willows and stuff, and that I am quite sure of that.

I did not try to stop them from getting this musty, moldy stuff, and knew right then and there that there was going to be trouble. No, I did not make any effort to get hay or anything else to feed them

(Testimony of George Brandel.)

anywhere else there. As I recollect, they were unloaded between nine and ten at night and reloaded about 10:20 A. M. the next morning.

I discovered the water was unfit for the horses to drink when I was in the yard—I saw them drinking, turned the water on myself and it was muddy and riley. There is something in muddy and riley water that does cause horses and mules to be sick. It seems to make them especially sick. (Tr. 47.)

The reason I thought the water was unfit for horses is it was like muddy, nasty water—unfit to water horses on long trips, and I told the man in charge at the time that the water was not very good. Yes, I let the horses drink it; it was all we could get. I realized at the time that it was going to make trouble with them.

I first noticed the trouble at Glenn's Ferry.

(Defendant's Exhibit "A" marked.)

Q. Mr. Brandel, is that your signature at the bottom?

A. Yes, I signed the name J. B. McGinn and then my own name. I do not remember the conductor whose name is on the paper. I would not know him if I saw him. I think the paper is in reference to the same shipment in question here. (Tr. 50.)

Yes, it is my opinion that the sickness of the horses and mules was due to the bad feed and water.

To the best of my knowledge and belief I never told the **[43]** agent at Pendleton, or anyone else there, that I thought the trouble with the horses was lung fever, and that it was due largely to the fact

(Testimony of George Brandel.)

that they had been on the road for a long time and I could not say that it was lung fever, and I don't believe I made that statement. I talked to some fellow at Pendleton about getting some hay but, to the best of my knowledge and belief, I don't think I said anything about lung fever. Yes, I signed the name J. B. McGinn and Company, by me, on Defendant's Exhibit "B," and that paper has reference to this shipment of horses and mules. (Tr. 54.)

No, I do not recognize either Mr. Manuel nor Mr. Moore as conductors in charge of the train between Glenn's Ferry and Huntington. I made a request upon one conductor in charge of the train between Glenn's Ferry and Huntington to set these horses and mules out for rest and feed. (Tr. 56.) I think it was about Weiser I made the request—I just said the time is about up and I would like to be set out. It was getting along on to 36 hours and I believe we exceeded 36 hours on the run. I think we did one time. The conductor said, as near as I remember, that we would get in pretty soon.

Redirect Examination.

(By Mr. EDMISTON.)

Mr. BRANDEL further testified:

I do not know why it was that we did not stop at Caldwell as the bill of lading states that as a place at which to stop and feed, and it was after passing Caldwell that I spoke to the conductor and told him that the time was about up and I would like to be unloaded. I was supposed to be set out at Caldwell. It was on the feed bill.

(Testimony of George Brandel.)

The COURT.—Do any of these papers in evidence cover this portion of the trip?

Mr. GILBERT.—Yes. **[44]**

Mr. EDMISTON.—I don't understand that you offered them.

Mr. GILBERT.—I will offer them as part of our case.

The WITNESS.—No, sir, I had no special authority conferred by the plaintiff upon me to sign 36 hour releases.

The COURT.—Congress conferred authority upon him to extend the time.

WITNESS.—I can identify the conductors when in uniform—the one that is wearing the clothes usually worn by conductors. (Tr. 60.)

Witness excused.

**Testimony of D. A. Braghel, for Plaintiff.**

(By Mr. EDMISTON.)

My name is D. A. Braghel and in February, 1917, I was freight agent for the O. W. R. & N. Co. at Walla Walla. Yes, I have seen that paper before. It is a freight bill of Mr. McGinn's for the transportation of livestock from Grand Island, Nebraska, to Walla Walla, including free charges. Yes, those are the feed bills—part of them.

Mr. EDMISTON.—We offer these bills in evidence.

Mr. GILBERT.—We have no objection.

Received and marked Plaintiff's Exhibit 4. (Tr. 62.)

(Testimony of D. A. Braghel.)

The distance between Pocatello, Idaho, and Huntington, Oregon, is 327 miles and the distance between Pocatello and Caldwell, Idaho is 253 miles, and from Caldwell to Huntington it is 73 miles, the distance from Pocatello to Glenn's Ferry is 160 miles.

Cross-examination.

(By Mr. GILBERT.)

Mr. BRAGHEL further testified:

The line of the O. W. R. & N. ends on the East at Huntington, Oregon. Huntington is the Eastern terminal.

Redirect.

(By Mr. EDMISTON.)

Q. The Oregon-Washington Railway & Navigation Company and the Oregon Short line and the Union Pacific Railroad Company are **[45]** all one system, are they not?

A. The Union Pacific is the parent company, the others are subsidiary lines.

Plaintiff's said Exhibit No. 4, consisting of seven sheets, is in part as follows:

**Plaintiff's Exhibit No. 4—Sheet No. 3.**

FREIGHT BILL.

This freight bill should accompany claim for overcharge, loss or damage.

UNION PACIFIC SYSTEM.

Walla Walla, Wash., Station, Feb. 24, 1918.

Consignee—J. B. McGinn. Bill 1341

Destination——.

Route—O. S. L. Huntington.

To Oregon-Washington Railroad & Navigation Company, Dr., for Charges on Articles Transported.

| Waybilled from. Waybill. Date and No. | Full Name of Shipper. |
|---|---|
| Pocatello, Ida. 2–19–OS. 166 | Leary & Warren. |
| | Car initials and No. UP. 36466 |
| | Original car initials and No. Up 45269 |

Number of packages, articles and marks.

Feed.

880# Hay at 125 cwt.

Advances. 11.00

Covered by Grand Island, Nebr. WBS UP. 292–293. 2–13–17. On form 903. 2–24–17. 1338–1339. 2–24–17.

Received payment for the company 2–28–17.

D. A. BROUGHEL,
Agent.

$11.00 (Tr. 159.)

**Plaintiff's Exhibit No. 4—Sheet No. 4.**

FREIGHT BILL.

This freight bill should accompany claim for overcharge, loss or damage. **[46]**

UNION PACIFIC SYSTEM.

Walla Walla, Wash., Station, Feb. 24, 1917.

Consignee—J. B. McGinn. Freight bill No. 1342.

Destination——.

Route——.

To Oregon-Washington Railroad & Navigation Company, Dr., for Charges on Articles Transported.

| Waybilled from. | Waybill. Date and No. | Full Name of Shipper. |
|---|---|---|
| Huntington, Oregon. | 2–21–188 | C. H. Libby. |

Car initials and No.
UP. 36466 UP. 45299

Feed charges.

1260 lbs. hay.....$15.75

Applies on UP. Grand Island, Neb., to Walla Walla, WBS 292–213–17, and form 903, 2–24–17.

Pro. 1338–1339. 2–24–17.

Received paument for the company, 2–28–17.

D. A. BROUGHEL,
Agent.

$15.75

**Plaintiff's Exhibit No. 4—Sheet No. 6.**

FREIGHT BILL.

Station—Walla Walla, Wash. Date, Feb. 24, 1917.

Consignee—J. B. McGinn. Freight Bill No. 1339.

Destination—via UP. OSL. OW.

To Oregon-Washington Railroad & Navigation Company, Dr., for Charges on Articles Transported.

| Waybilled from. | Waybill. Date. | Series and No. | Consigner. |
|---|---|---|---|
| Grand Island, Neb. | 2–13. | UP. 292 | J. B. McGinn and Co. |

Car initials and No. UP 36466.

Number of packages, articles and names. **[47]**

Mules, (ORSL. & Co.) 23,000. 265.00 265.00

Dec. value $150 Each.

#24 head of horses and mules at Walla Walla.

D. A. BROUGHEL,
Agent.

36 your release inspection certificate att'd.

36 ft. car ordered.

Loaded Grand Island, 4:30 A. M. 2–14–17. Contract #134. Feed Caldwell, Ida. Feed at Cheyenne, Wyo. Feed at Walla Walla.

Reloaded Pocatello 10:30 A. M. 2–19–17. Reloaded at Green River, Wyo., 6 P. M. 2–17. Huntington 10:15 A. M. 2–21 Cheyenne, Wyo. 2:00 A. M. 2–;6. See Green River Wyo., feed bill UP: 103 2–19 on form 903 2–24 Pro. 1340 2–24–17. Pocatello, Ida., Feed bill OS. 166 2–19 on form 903 2–24 pro.

1341–2–24–17.

Cheyenne, Wyo. Feed bill UP. 332 2–15 on form 1341 2–24–17.

Huntington Feed bill 188 2–21 on form 1344 2–24–17.

902 pro.

Pendleton Feed bill 927 2–22 on form 1342 2–24–17.

1342 2–24–17.

1343 2–24–17.

Back of WB. reference; unloaded at Pocatello 9:45 P. M. 2–18

Reloaded 10:30 A. M. 2–19.

Reloaded 10:30 A. M., unloaded at Pendleton 11:20 A. M. 2–21.

Reloaded 10:30 A. M., reloaded at Pendleton 9:30 A. M. 2–22.

Reloaded 10:30 A. M., unloaded at Walla Walla, 4 P. M. 2–22.

Received payment for the company, 2–28 1917.

D. A. BROUGHEL,

Agent.

Total to collect—265.00.

**Plaintiff's Exhibit 4—Sheet &**

FREIGHT BILL.

Station Walla Walla, Wash., Feb. 24, 1919.

Consignee—J. B. McGinn.

Freight Bill No. 1338.

Via UP. Granger O. S. L. Huntington.

To Oregon-Washington Railroad & Navigation Company, Dr., **[48]** for Charges on Articles Transported.

| Waybilled from. | Waybill. | Date. | Series and No. | Consigner, |
|---|---|---|---|---|
| Grand Island, Neb. | 270. | 2–13–17. | 203 | J. B. McGinn. |

Car initials and No. UP. 45769.

| | | | |
|---|---|---|---|
| Horses (O. R. S. L. & Co.) | 23,000 | $265. | $265. |
| Dec. value $150 per horse, | | | per car. |

21 head of horses and mules at Walla Walla, D. A. Broughel, Agt.

36 hour release. Inspection certificate att'd to waybill 292.

36 ft. car ordered.

Loaded at Grand Island, 4:30 A. M. 2–14. Contract 135, feet at Cheyenne, Wyo. Feed at Caldwell, Idaho. Feed at Walla Walla.

Reloaded at Cheyenne 2:00 A. M. 2–16. Reloaded at Green River, 6 P. M. 2–17.

Reloaded at Pocatello 10:30 A. M. 2–19. Reloaded at Huntington, UP. 10:15 P. M. 2–21–17.

See Green River, Wyo., feed bill 103, 2019 on form 903 Pro. 1340 2–24–17.

(Testimony of Otto Minnick.)

See Pocatello, Ida. feed bill O. S. 166 2–19 on form 1341.

See Cheyenne feed bill UP. 332 2–15 on form 1344.

See Huntington feed bill 188 2–21 on form 902 1342.

See Pendleton feed bill 927 2–22 on form 1343.

Back of WB. reference unloaded at Pocatello 9:45 P. M. 2–18–17.

Reloaded 10:30 A. M. 2–19.

Unloaded at Pendleton 11:20 P. M. 2–21.

Reloaded 9:30 A. M. 2–22.

Unloaded at Walla Walla 4 P. M. 2-22.

Received payment for the company 2–28, 1917.

D. A. BROUGHEL,
Agent.
$265.00

Witness excused.

**Testimony of Otto Minnick, for Plaintiff.**

(By Mr. EDMISTON.)

My name is Otto Minnick. I have lived in **[49]** Spokane for the last fourteen years. My business is veterinarian, which I have followed that for the last 15 years. I am a graduate veterinarian from State College of Washington, and have been veterinary instructor in that college for the last 10 years.

About the first of March, 1917, I had occasion to inspect a shipment of horses and mules for Mr. McGinn at Spokane. I was temporarily in the employ of the Union Stock Yards Company—in the capacity as *instructor* of animals before they were offered for sale at auction, and as such I inspected

(Testimony of Otto Minnick.)

some 20 head of this McGinn shipment. These animals were in an emaciated and debilitated condition—showing a condition that affected the intestinal tract of the animal—commonly known as inflammation of the bowels according to the general symptoms that were present. The scientific name of this disease is gastro-enteritis. About the middle of March, 1917, Mr. McGinn called me in to examine and treat such of these animals as were seriously sick, and for a period of about 30 days I saw a number of these animals at intervals of three or four days. The permanent impairment of gastro-enteritis which involves the intestinal tube depends upon the severity of the infection. These animals had rather a severe attack of gastro-enteritis. The only cause that has been found by veterinarians that will result in the inflammatory condition of the intestinal tube or gastro-enteritis is irritation—that irritation may be a chemical irritation or it may be a fungus infection—or it may be a pathalogical **[50]** infection of the intestinal tract or tube, and this irritation most usually is gotten through the food or drink. Yes, fungus irritation is a mold; yeasts are of the fungii group. Yes, animals that feed upon what is known as fungii or a feed that is infested with mold is known as fungus-infected feed. Any irritation will produce an inflammatory condition of the intestinal tract. Swamp hay containing irritation will cause it. Wild hay has been known to produce an inflamed condition in animals. The time between

(Testimony of Otto Minnick.)

taking on the irritant and the infection depends upon the severity of the infection or irritation. The more severe the irritation the more rapidly the development of the disease. Under ordinary conditions the more prolonged period of fasting, followed by an infection or irritation, the more rapid the development of the inflammatory condition of the intestinal tube. Animals confined in shipping for four or five days and eating infected hay would probably develop gastro-enteritis within 24 hours. The first symptom noticed is usually uneasiness, which is followed by evidence of pain and frequently accompanied by hyperaction of the intestinal tract or tube, which causes the production of diarrhoea. In severe cases we have every form of nervous manifestation from slight muscular twitchings to complete paralysis. In those cases that develop complete paralysis they usually die in a state of coma and are unable to raise up, and their bowels are continuously hyperactive. The pain is usually in the intestinal region and the animal would be all drawn up—usually very usually quite liquid and offensive and contains much drawn up. (Tr. 69.) The voided contents is clumps of blood and pus.

Animals afflicted with a severe inflammatory process of the intestinal tube are usually quite permanently impaired from the point of usefulness; as their capacity to digest food is very **[51]** frequently much lessened. Animals have been known to die in a short time after the injection of the irritation and they might die after seven days,, and they might re-

(Testimony of Otto Minnick.)

cover, partially, or more or less completely. Many ordinary horsemen are not able to detect a severe disorder of the intestinal tube. He would know that something was wrong, but as to the exact condition he might not be able to surmise what the conditions were.

Various chemicals when introduced into the animal's system cause irritation. The most common one that is found in feed is lead. Arsenic is another and various others. These chemicals might be introduced from water. I observed some of the animals of this shipment about six weeks ago. They are quite emaciated and showed much evidence of nervous misfunctioning which was manifest in inability to move in a straight line. I saw one of these animals after it was sold—it was sick apparently from intestinal disturbance, and it was a severe case, and I judge rather permanent in nature. This was about the middle of April, 1917. I have not had occasion to follow it up since.

Cross-examination.

(By Mr. GILBERT.)

Mr. MINNICK further testifies:

Yes, I do considerable veterinary work for Mr. McGinn; whenever his horses are sick, I am called in. I have had experience in observing horses and mules that have been shipped long distances. Horses and mules being shipped from Grand Island, Nebraska, to Pocatello, Idaho, and being in the cars about five days in periods from 28 to 33 hours without rest and feed, would show the effects of a trip, and it is usually

(Testimony of Otto Minnick.)

manifest in a tiredness or exhaustion and loss of weight. The condition I found these horses and mules in were such as is produced or caused by chemical substances and bacterialogical substances, fungus and fungus affected food and poisonous weeks. A mild manifestation of [52] the disease might be produced by irregular diet where horses and mules are confined in cars for several days for periods from 28 to 33 hours each, but I never have seen a case severe enough to result in death under conditions of that kind. (Tr. 76.)

I do not know of an experience of this disease being caused or developed in horses and mules that had been shipped for several days, and after having no feed for 33 hours and then allowed to drink and eat all they wanted of proper feed and water. Such a result is possible but not probable. If all the horses and mules got an equal amount of improper food such as moldy and musty hay and were equally responsive to the process of irritation, there would be an equal condition of the disease among them.

This disease might be produced and developed by lead or chemicals in the food or water.

No, water that is suitable for people to drink, without any bad effect, would be suitable for mules and horses to drink.

Redirect examination.

(By Mr. EDMISTON.)

Mr. MINNICK further testifies:

The fact that 49 head of horses and mules were not equally effected might be accounted for on the bases

(Testimony of Otto Minnick.)

of unequal resistance on the part of the animal; or unequal amounts of the irritation injected into the intestinal tube. The resistance of the animal on one hand and the amount of irritation introduced on the other.

Witness excused.

Mr. EDMISTON.—Plaintiff rests.

Mr. GILBERT.—At this time the defendant moves the Court for a nonsuit and the discharge of the jury for the following reasons:

First. That it conclusively appears from the evidence that the only act of negligence is the claim of improper and impure food and water at Pocatello—a point not on the line of this defendant railroad company. **[53]**

The COURT.—Do you claim the defendant is liable for injuries not on its own line?

Mr. EDMISTON.—The contract shows that they are all one, the Union Pacific System, and the Oregon-Washington Railway & Navigation Company as a part of the system is a party to the contract and is liable under the contract. The contract so states right at the head of it, and it is admitted in the stipulation, that defendant is a part of the Union Pacific System.

The COURT.—Unless this contract should be considered to be a contract of this defendant there is no liability.

Mr. GILBERT.—The second ground for nonsuit is that it conclusively appears from the evidence, or fails to appear therefrom, that the stockyard where they got this bad feed and water was operated by this defendant railway company.

The COURT.—I had that in mind, but the testimony shows that you, apparently, paid the bill.

Mr. GILBERT.—There is a third point; under the contract, and under the law, that the shipper must look after the stock, and it is his duty to see that they get proper food and water.

The COURT.—I think there is possibly enough on that point to carry the case to the jury, but the proof will be limited to that one question as to whether or not the hay was actually furnished by the railroad company, and as to the quality of the hay.

Mr. GILBERT.—Exception.

Mr. EDMISTON.—It seems to me that under the pleading the 36-hour question is still a question.

The COURT.—There is no charge in the complaint that 36 hours were exceeded and no statement as to the time of their arrival and the time they were unloaded.

Mr. EDMISTON.—We claim the Congress of the United States has settled that. That it must be at least five hours' rest, the time between leaving Pocatella and leaving Huntington is more than 48 hours. [54]

The COURT.—Call in the jury. I adhere to my ruling that that is the only issue in the case—the quality of the hay, and whether or not the company furnished it.

Mr. EDMISTON.—We except to the Court's ruling. Eliminating all other issues from the case, and especially that of exceeding the 28-hour limit, and of exceeding the 36-hour limit and as to the authority of caretaker to sign 36-hour release, and of failure to un-

load the horses and mules for treatment, feed and rest as requested by caretaker, and the failure of the defendant to deliver the shipment at destination, and failure to deliver at all the 11 head that died, to the consignee at any time or place, and the failure to allow plaintiff's claim of $61.00 freight on 20 head of the horses from Walla Walla to Spokane, to go to the jury.

DEFENDANT'S TESTIMONY.

**Testimony of J. F. Stewart, on Behalf of Defendant.**
(By Mr. GILBERT.)

My name is J. F. Stewart, of Pocatello. I am manager of the stockyards at that point on the Oregon Short line.

Q. Is the business handled by a company, or is it handled in your own name?

A. It is handled by Messrs. O'Leary & Warren Co., and it was so handled in February, 1917. They are engaged in the stockyard business at Pocatello and other points.

Mr. EDMISTON.—I object to this line of testimony, as irrelevant and immaterial.

The COURT.—Objection is overruled.

Mr. EDMISTON.—Exception.

I have been engaged in the business of feeding stock since 1912 and in charge of the Pocatello Stockyards since June, 1916, and in February, 1917, was operating there for the O'Leary & Warren Company. At Pocatello the yards are situated about two [55] miles in a northwesterly direction from the center of town. I cannot say whether I was at the yards on February 18th, when this shipment came in, or not,

(Testimony of J. F. Stewart.)

but I did not unload or reload the horses. They were handled at that time by A. J. Eaton, and W. R. Stewart, who were in my employ. I bought all the hay and feed that was used in that yard; most of it was purchased from the farmers near there, who baled it and hauled it to the barn. Some of it went in as early as December. Three carloads we bought from hay dealers. Some was bought near Twin Falls. On the farm I looked at the hay to see what it was when I contracted for it from the farmers, and when these cars came to the yard it was inspected **[56]** before unloading. The hay was all good alfalfa. So far as I could determine on inspection there was no moldy or musty hay or any that contained poisonous weeds. I did not know of any of the hay that was mixed with timothy or with swamp grass. In the lot I bought from Mr. Hurley there was a sprinkling of timothy through the alfalfa, but no swamp grass or weeds.

We operated the stockyards under a contract with the Oregon Short Line and it was the common practice to telephone feed charges for all stock over to the yard office where I would make the advance charge on the waybill that would follow the shipment, and those charges would be collected at the destination from the shipper for us. I do not know whether that was done in this particular case, but we received our money. I don't think there was a request from any one to furnish feed for the McGinn horses and mules. Pocatello had about 15,000 inhabitants and there were other places from which feed could have been gotten for the horses and mules.

(Testimony of J. F. Stewart.)

The water that is furnished to the yards is piped from a point three miles northwest of the yards to the railroad shops and yards. It was spring water. The men at the shops and also at the stockyards drink this water. It is clear water.

In February, 1917, we handled 130 cars of stock, and in the year 1917, we handled 3,500 cars. If we handle livestock I instruct the men first to unload them, and put out the hay, and in an hour, or an hour and a half, to turn on the water. Have them eat a little before drinking.

Cross-examination.

(By Mr. EDMISTON.)

Mr. STEWART further testified:

I don't remember of seeing the particular shipment of Mr. McGinn, and I do not know about the facts of what occurred to plaintiff's shipment except I know what supplies of hay was there **[57]** and what water was there. I don't remember the horses or stock that was in the yards on that day—nor the time of day the McGinn horses arrived. I had no hay there other than alfalfa that was in the barns at that time. Shippers sometimes wanted timothy hay, but I would not have it for them. Probably a mile from the yards a Mr. Perkins lived who had a stack of timothy hay. I had had hay from him at night at other times. We were handling an awful lot of stock, and the boys at the yard were pretty well run out of hay and I had him deliver hay at that time for me, and he worked at night.

(Testimony of J. F. Stewart.)

Most of our business is from the railroad; stuff being fed that is in transit. We usually get advices from the shipper, but if stock is placed at the chute to be unloaded by the railroad, and if there is no caretaker there to feed them we feed them ourselves. We simply use our judgment. If there is no shipper, we feed the stock. If the shipper comes in we follow his instructions. If the caretaker is not there when the cars are spotted we unload and feed the stock and do not wait at all for the caretaker to come. We had only alfalfa hay grown by irrigation under the Fort Hall Water Project. I am not sure from what river the irrigation water comes. I think the hay was irrigation project grown hay. (99.)

The town of Pocatello was about two miles away from the stockyards. I hardly think there would be any place open there at night from which one could get feed. If a shipper went elsewhere for feed we charged nothing for the yards, but charged one dollar a car for loading and unloading. We are in there for the purpose of selling hay to shippers and making our profit, and expect them to buy from us if our hay is as good as anybody else's.

Most of our charges are collected by the railroad.

We pay the railroad on a contract for the use of the [58] yard by the year. The water-troughs at the yards are made of wood and are 18′ long and about a foot wide at the bottom.

Witness excused.

**Testimony of D. A. Braghel, for Defendant.**

(By Mr. GILBERT.)

Mr. BRAGHEL, witness for defendant, being duly sworn, testified as follows:

My name is D. A. Braghel, and I am station agent for the O. W. R. & N. Co., at Walla Walla, and have been for about eleven years. The common practice of handling feed bills for stock in transit is to forward these claims, for feed and supplies, to agent at destination. They put the charge on the waybill and they passed them up that way. I dare say that 95% of all these bills are handled that way. This money the railroad collects and pays out to parties who furnish the feed. Those charges for feed, etc., are collected along with the freight at the time the freight bill is collected. If the shipper refuses to pay the charges the railway company holds the stock just the same as it would for freight.

Cross-examination.

(By Mr. EDMISTON.)

The railroad has the same right and can hold the same lien for the feed that we have for the freight upon the stock.

The railroad employs people to operate these stockyards for them upon leases or contracts. The railroad employs, at points like Pocatello, where they handle about 3,500 carloads of cattle, etc., a year, men to operate the stockyards and they operate them with instructions that they shall follow the instructions of the caretaker, and if the caretaker is not present, it is incumbent upon the railroad to unload the stock

(Testimony of D. A. Braghel.)

and feed and water them and they have to do that because it is required under the Federal law. (108.)

[59]

Witness excused.

Mr. GILBERT.—I want to introduce the 36-hour release which I have here.

Mr. EDMISTON.—I object to it as incompetent, irrelevant and immaterial and in no manner binding upon this plaintiff; as it is not shown that the attendant had any authority to sign such papers nor that an emergency existed.

The COURT.—The Federal statutes provides that the caretaker has authority to extend such time.

Objection overruled. It will be admitted.

Mr. EDMISTON.—Excepted.

**Defendant's Exhibit "A."**

Filed in the U. S. District Court, Eastern District, Washington, June 26, 1919. W. W. Hare, Clerk.

Dated at—On line 2–18–1917.

I hereby request and authorize O. S. L. Ry. transporting horses and mules contained in cars U. P. 45,269 and U. P. 36,466. Loaded at Green River Station at 6 P. M. Feb. 19th, 1917, under waybills and contract made at Grand Island station under date of 13th day of February, 1917, to confine said livestock in said cars for thirty-six hours without unloading for feed, rest and water, as provided in an Act of Congress to prevent cruelty to animals in transit, approved June 29, 1906.

J. B. McGINN & CO.
G. F. BRANDELL.

MANUEL, Witness.

**Defendant's Exhibit "B."**

Filed in U. S. District Court, Eastern District of Washington, June 26, 1919. W. W. Hare, Clerk. [60]

Dated at Nampa, 2–20–1917.

I hereby request and authorize O. S. L. RY. Co. transporting horses and mules contained in cars U. P. 45,269 and U. P. 36,466 Reloaded at Pocatello station 10:30 A. M. 2–19–17 under waybills and contracts made at Grand Island, Nebraska station under date 2–13–17, to confine said livestock in said cars for thirty-six hours without unloading for rest, feed and water, as provided in an Act of Congress to prevent cruelty to animals while in transit, approved June 29, 1906.

J. B. McGINN & CO.
G. F. BRANDELL.

F. BERGMAN, Condr.,
Witness.

**Testimony of T. F. O'Brien, for Defendant.**

(Mr. GILBERT.)

T. F. O'BRIEN, being duly sworn, testified for defendant, as follows:

My name is T. F. O'Brien, and I am employed by the O. W. R. & N. Railway Company at Pendleton, Oregon, as agent. Have been there since 1910, and was there in February, 1917, and remember the J. B. McGinn shipment of horses and mules. I recall that there were six mules and horses taken out of the cars while there. I saw and talked with the man in charge of the shipment. I don't know whether George Bran-

(Testimony of T. F. O'Brien.)

del was the man in charge or not, but I know I had a talk with the caretaker. The stock arrived at Pendleton at 11:20 P. M., the night of the 21st, and was unloaded at 11:30 P. M. It was reloaded at 7:30 A. M. and forwarded at 10:30 A. M. the 22d. I talked with the caretaker on the morning of the 22d, and he stated to me that in his judgment the horses were suffering from lung fever.

Cross-examination.

(By Mr. EDMISTON.)

Mr. O'BRIEN further testifies: **[61]**

I could not identify Mr. George Brandel now, but I know I talked to the man in charge of the stock, and he admitted that he was the man. There was one dead mule in the car when it arrived; there was another one dead the next morning in the stockyard. For this reason I was talking with the man in charge. I saw the horses, and noticed they looked gaunted. Looked as though they had been on the cars a long time, and remarked that they had been on the road about eight days since they left Grand Island, Nebraska.

Witness excused.

It is admitted that the Government weather reports show that at Pocatello, Idaho, on February 18, 1917, the minimum temperature was 13° above zero, and at Montpelier, Idaho, the temperature was 5° above zero, and on the 19th, at Gooding, Idaho, the minimum temperature was 18° above zero, and on the 20th, at Payette, the minimum was 21° above zero.

**Testimony of Frederick Moore, for Defendant.**

(By Mr. GILBERT.)

Mr. MOORE testified as follows:

My name is Frederick Moore. I live at Pocatello, Idaho. I have been in the train service of the Oregon Short Line Railway for ten years and familiar with the depot and stockyards at Pocatello. The railway company has its pumping station about two or three miles west of Pocatello. (Tr. 117.) They pump direct from a spring to the reservoir and from the reservoir piped to the stockyards and shops and depot. The men at the yards and shops depend upon it for drinking purposes, and the trains are supplied with the same water. I have drank the water and it is clear spring water. There are several hundred men at the shops, and I have never heard of any person that suffered illness from the water.

Cross-examination. [62]

(By Mr. EDMISTON.)

Mr. MOORE further testifies:

I was a freight conductor on the Short Line in February 1917, and handled the McGinn shipment from Pocatello to Glenn's Ferry. I had nothing to do with the sick horses at Glenn's Ferry and did not know about them at all. The supply of water at Pocatello was from a spring along the river or creek and do not know whether any horses or mules had ever been sick from drinking the water or not.

Redirect Examination.

(By Mr. GILBERT.)

I have worked out of Pocatello for the last ten

(Testimony of Frederick Moore.)

years. We have used this same water in the cabooses all this time.

Witness excused.

Mr. GILBERT.—The defendant rests.

PLAINTIFF IN REBUTTAL.

**Testimony of George Brandel, for Plaintiff (In Rebuttal).**

GEORGE BRANDEL, for plaintiff, by Mr. EDMISTON, further testified:

I don't recognize Mr. D. F. O'Brien as the man or agent I talked with at Pendleton at all.

Cross-examination.

(By Mr. GILBERT.)

No, sir; I don't remember Mr. O'Brien nor any of those conductors.

Witness excused.

**Testimony of Otto Minnick, for Plaintiff (In Rebuttal).**

(By Mr. EDMISTON.)

I don't know that the weather has any effect upon the production of the disease of gastro-enteritis in horses. Gastro-enteritis is manifested first by uneasiness and then by abdominal pains. Gastro-enteritis is an inflammatory condition of the intestines while lung fever is an inflammatory condition of the lungs only. One manifests itself in diarrhoea while lung fever is manifest by rapid respiration and coughing. (Tr. 125.) **[63]**

(Testimony of Otto Minnick.)

Cross-examination.

(By Mr. GILBERT.)

Yes, I have heard of horses and mules contracting gastro-enteritis from drinking extremely cold water. Just cold air 15° above zero, I think, would not have any effect upon the physical condition of horses and mules, and whether cold weather would have any effect upon horses and mules shipped in open stock cars over long trips would depend on whether or not the animals are used to that temperature.

Witness excused.

Plaintiff rests.

Mr. GILBERT.—At this time the defendant renews its motion to discharge the jury and direct the jury to bring in a verdict for the defendant on the ground that it appears that there is no liability on the part of this defendant.

The COURT.—The only question, in my mind, is whether the railroad company acted in feeding these horses and mules because there was a default on part of the owner, and I am afraid there is sufficient on that to carry the case to the jury.

Mr. GILBERT.—We can stipulate that these questions can be considered on motion for judgment notwithstanding the verdict.

The COURT.—It is stipulated and agreed between *consul* for the respective parties that the question of sufficiency of the evidence may be considered by the Court upon a motion for judgment notwithstanding the verdict in case the jury returns a verdict in favor of the plaintiff, and if upon consideration of

said motion the Court is of the opinion that there was not sufficient testimony to support a verdict in favor of plaintiff, the Court shall dismiss the action instead of awarding a new trial.

Mr. GILBERT.—I ask for an exception to the overruling of the motion made for a directed verdict at this time. **[64]**

*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corporation,

Defendant.

**Verdict.**

We, the jury, in the above-entitled cause, find for the plaintiff and assess the amount of his recovery at $1,870.

JOHN E. LITTLE,
Foreman.

Filed in U. S. *District of Washington,* Eastern District of Washington, June 26, 1919. W. W. Hare, Clerk. **[65]**

*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

J. B. McGINN,

Plaintiff,

vs.

OREGON - WASHINGTON RAILROAD AND NAVIGATION CO., a Corp.,

Defendant.

**Petition for New Trial.**

Comes now the above-named defendant and moves the Court to set aside the verdict of the jury rendered and entered in the above-entitled cause on the 26th day of June, 1919, and grant a new trial to the defendant of the issues herein upon the following grounds and for the following reasons.

1. Insufficiency of the evidence to justify the verdict of the jury.

2. Error of law occurring at the trial in the following particulars, to wit:

(a) Refusal of the Court to grant the defendant's motion for nonsuit.

(b) Refusal of the Court to grant defendant's motion to instruct the jury to bring in a verdict for the defendant.

(c) Refusal of the Court to give the instruction directing the jury to bring in a verdict for the defendant.

(d) Error of the Court in instructing the jury that the Act of Congress known as the 28 hour law,

modifies Section III of the livestock contract placing the duty upon the shipper to feed and water the stock.

HAMBLEN & GILBERT,
Attorneys for Defendant. **[66]**

Service of the within petition is hereby acknowledged this 26th day of June, 1919.

R. L. EDMISTON,
Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington, June 28, 1919. Wm. W. Hare, Clerk. By J. Dunham, Deputy. **[67]**

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*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

J. B. McGINN,

Plaintiff,

vs.

OREGON - WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corp.,

Defendant.

**Motion for Judgment Notwithstanding the Verdict.**

Comes now the above-named defendant and moves the Court to set aside the verdict heretofore rendered in this case and rendering judgment in favor of the defendant dismissing the above-entitled action in accordance with the terms of the stipulation entered into in open court between the parties

hereto authorizing the above-entitled court upon consideration of the motion for new trial to set aside said verdict and render judgment, if in the opinion of the Court no case has been made by the plaintiff.

This motion is made upon the ground that it appears from the testimony and evidence in the case:

1. That the act or acts alleged as the cause of the injury and damage to the livestock in question occurred solely and entirely upon a line of railroad not owned, operated or controlled by this defendant.

2. That it conclusively appears from the evidence and testimony that the stockyards at Pocatello, Idaho, were operated and controlled by parties other than the Oregon Short Line Company; that said railroad had nothing to do with furnishing the hay or feeding the stock in question.

3. That it appears from the evidence that the keeper in charge of said horses and mules knew of the condition of the hay and water and that it would produce injurious results if consumed by said horses and mules, and that he permitted them to consume it without making any attempt to procure other water or feed. **[68]**

HAMBLEN & GILBERT,
Attorneys for Defendants.

Service of the within motion is hereby acknowledged this 28th day of June, 1919.

R. L. EDMISTON,
Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington, June 28, 1919. Wm. W. Hare, Clerk. By J. Dunham, Deputy. **[69]**

*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corporation,

Defendant.

R. L. EDMISTON, for Plaintiff.
HAMBLEN & GILBERT, for Defendant.

**Memorandum Opinion.**

RUDKIN, District Judge.

On the 13th day of November, 1917, the Union Pacific Railroad Company entered into the livestock contracts with the plaintiff McGinn for the shipment or transportation of two carloads of horses and mules from Grand Island, Nebraska, to Spokane, Washington. The contracts were of the uniform type, and contained the following provisions, among others:

"1. Except as otherwise provided by statute law, the carrier undertakes to transport said shipment only over its own line and acts only as the agent of the shipper with respect to the portion of the route beyond its own line. No carrier shall be liable for damages for loss, death, injury or delay to said animals, or any thereof, not caused by it, but nothing contained

in this contract shall be deemed to exempt the initial carrier in case of a through interstate transportation from any liability for loss, death, damage or injury caused by it, or any common carrier, railroad or transportation company to which the livestock may be delivered under this contract. * * *

"3. The shipper will, at his own risk and expense, load, unload, care for, feed and water the stock until delivery of the same to consignee at destination, and will furnish to go with the stock for that purpose, one or more attendants, according to the rules of the carrier, and if the shipper fails to furnish such attendant, or if the latter neglects to perform his duties, whatever shall be done by the carrier in respect to the handling and care of the stock in transit, shall be considered as done by it **[70]** at the request and as the representative of the shipper, and at the risk and expense of the shipper."

While in transit from Grand Island, Nebraska, to Spokane, Washington, the shipment passed over the lines of the Union Pacific Railroad Company from Grand Island, Nebraska, to Granger, Wyoming; over the lines of the Oregon Short Line Railroad Company from Granger, Wyoming, to Huntington, Oregon; and over the lines of the Oregon-Washington Railroad and Navigation Company from Huntington Oregon, to Spokane.

The present action was brought against the latter company to recover damages for injury to the stock while in transit. One of the grounds of negligence

charged, as amplified by a bill of particulars furnished by the plaintiff, was the furnishing of improper feed and water at Pocatello, Idaho, while the animals were in transit over the lines of the Oregon Short Line Railroad Co., upon the conclusion of the testimony the Court withdrew from the consideration of the jury all grounds of negligence charged in the complaint except the one above mentioned. The defendant on its part then challenged the legal sufficiency of the testimony to support a verdict in favor of the plaintiff and moved the Court to direct a verdict for the defendant. The latter request was denied, upon stipulation of the parties that the question of the sufficiency of the testimony to support a verdict might be considered by the Court after verdict, and that if upon such consideration the Court was of opinion that there was no testimony to go to the jury or to support a verdict in favor of the plaintiff, an order of dismissal should be entered instead of awarding a new trial. This was the practice followed in Wood vs. Potlatch Lumber Co., 213 Fed. 591.

It will be observed from the foregoing statement that the negligence causing the damage or injury, if negligence was in **[71]** fact shown, was the negligence of the Oregon Short Line Railroad Company and not that of the present defendant, as the injury occurred prior to the delivery of the shipment to the defendant. If, therefore, defendant is liable to the plaintiff, it must be upon one of three grounds: First, because of the Carmack Amendment to the Interstate Commerce Act and the Acts

amendatory thereof, 34 Stat. 595; 38 Stat. 1196; 39 Stat. 441; second, because the several carriers were copartners and thus jointly and severally liable; or third, because of the relationship existing between the three companies over whose lines the stock was transported.

1. The so-called Carmack Amendment does not create an involuntary partnership between different connecting carriers, nor does it impose liability on the delivering or last carrier, for any negligence except its own. In other words, the common-law rule that an intermediate carrier and the delivering carrier are only liable for their own negligence still obtains.

Atlantic Coast Line vs. Riverside Mills, 219 U. S. 185–196.

Rudson vs. Chicago, St. P. & O. Ry., 226 Fed. 38.

No doubt, as a general rule, if property is delivered to the initial carrier in good condition, and is delivered by the last carrier in bad condition, the presumption is that the injury occurred on the line of the last carrier. Whether this rule would apply to livestock accompanied by the owner or his agent may admit of some question, but in any event the presumption was overthrown by the proof of the plaintiff showing conclusively and beyond question that the injury did not occur on the lines of the defendant.

2. Nor can the delivering or last carrier be held liable for the negligence of a preceding carrier on some partnership theory where no such partnership existed in fact.

3. The only testimony in the record disclosing the [72] relationship existing between the different carriers in this case is the heading of the shipping contract:

"UNION PACIFIC SYSTEM.
Union Pacific Railroad Company.
Oregon Short Line Railroad Company.
Oregon-Washington Railroad & Navigation Company."

which, as already stated, was the contract of the Union Pacific Railroad Company, and the brief statement by one of the agents of the defendant company:

"The Union Pacific is the parent company. The others are subsidiary lines."

A system of railroads no doubt indicates a relationship of some kind between different lines for operating purposes, but I do not understand that a number of independent lines or a number of lines owned by independent corporations are each liable for the contracts and negligence of the other, simply because the several lines are operated as or called a system. What is meant by the parent company of the subsidiary company is very indefinite indeed. It may mean stock ownership or stock control, or a great many other things, but the mere stock ownership or stock control of one company by another does not make either company liable for the contracts or negligence of the other.

Atchison, T. & S. F. Ry. vs. Cochrane, 23 Pac. 151.

Gulf C. & S. F. Ry. vs. Lee, 65 S. W. 54.

Texas & Mo. Ry. vs. Gray, 99 S. W. 1125.

For these reasons I am of the opinion that the testimony fails to show that the defendant is liable in damages for the negligence of the Oregon Short Line Railroad Company, and that a verdict in its behalf should have been directed. In accordance with the stipulation of the parties a judgment of dismissal will therefore be entered, notwithstanding the verdict of the jury.

Reaching this conclusion, it becomes unnecessary to determine whether the negligence of the attendant in charge of the **[73]** livestock was such as to bar a recovery.

Filed in the U. S. District Court, Eastern District of Washington. August 25, 1919. Wm. W. Hare, Clerk. By H. J. Dunham, Deputy. **[74]**

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*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

**Judgment.**

This case coming regularly on for hearing upon the motion of the defendant for judgment setting aside the verdict of the jury heretofore rendered herein and dismissing the above-entitled action in accordance

with stipulation made and entered into between the respective parties in the above court prior to the submission of said cause to the jury, and the Court having heard the argument of counsel and taken said cause under advisement and filed herein its written opinion and decision;

IT IS ORDERED, that the verdict of the jury in the above-entitled action heretofore rendered on June 26, 1919, in favor of the plaintiff and against the defendant, be, and the same is hereby set aside; and,

IT IS HEREBY ORDERED AND ADJUDGED, That notwithstanding said verdict of the jury, plaintiff's complaint herein be dismissed and that the defendant have and recover its costs and disbursements herein expended, to all of which plaintiff excepts and exception allowed.

Done in open court this 28th day of August, 1919.

FRANK H. RUDKIN,
District Judge.

Service of the within is hereby acknowledged this 29th day of August, 1919.

F. L. EDMISTON,
Attorney for Plaintiff.

Filed in U. S. District Court, Eastern District of Washington, August 28, 1919. Wm. W. Hare, Clerk. By H. J. Dunham, Deputy. [75]

*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

**Petition for Rehearing on Motions.**

Plaintiff now here petitions the above-entitled Honorable Court for a rehearing and reconsideration of defendant's motion for judgment notwithstanding the verdict and for a new trial therein upon the following grounds, to wit:

1. The Court's decision overlooks the fact that the pleadings admit, in paragraphs 2 of the complaint and of the answer, that the Union Pacific Railroad Company, during the times mentioned in the complaint, operated between Omaha, Nebraska, and Huntington, Oregon, through the cities of Grand Island and North Platte, Nebr., Cheyenne, Wyoming, Pocatello and Caldwell, Idaho, to and connecting with the railway lines of the defendant at Huntington, Oregon.

2. The decision overlooks the failure of defendant railway company to deliver any of the horses and mules at destination—Spokane—set out in the bill of lading under which the shipment was made.

3. The opinion overlooked the discharge of the horses and mules at Walla Walla by the defendant under plaintiff's protest the further fact that ten (10) horses and mules were dead or dying and did die in the hands of the defendant railway company and were never delivered to consignee.

4. The opinion overlooked the further fact that on June 17, 1919, defendant duly stipulated and filed herein "That defendant herein is a part of the Union Pacific System of Railways."

5. That the verdict herein amounts to only the agreed [76] value of the eleven (11) dead horses and mules at $150 per head, and the freight at $20 per head paid thereon.

6. That the freight and expense bills herein were tendered by and in the name of defendant railway company and paid by plaintiff to defendant for the entire shipment.

7. That the decisions of said motions is contrary to the Carmack Amendment and amendments thereto made by Congress in 1918 and in 1916 and also in conflict with the opinion of the United States Supreme Court in the late case of Texas and P. R. Co. vs. Leatherwood, decided June 9, 1919, and cases therein cited.

8. That defendant railway company received and shared in the benefits and profits paid by plaintiff for freight and expense charges upon said shipment as a party to the contract of shipment.

9. That the pleadings and evidence show that defendant received said shipment without exception as to any abnormal or damaged condition of the horses

and mules therein, and that the evidence fully shows that the effect and results of the damage to said horses and mules was brought out and became apparent while the same were in the hands of the defendant.

Respectfully submitted,

R. L. EDMISTON,
Attorney for Plaintiff.

Service of the foregoing notice and petition hereby acknowledged this 27th of August, A. D. 1919.

HAMBLEN & GILBERT,
Attorney for Defendant.

Filed in U. S. District of Washington. August 27, 1919. W. W. Hare, Clerk. [77]

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*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

**Order Denying Motion for Rehearing on Motion for Judgment Non Obstante Veredicto.**

This cause coming on for hearing on the 28th day of August, 1919, in open court, upon plaintiff's petition for rehearing and reconsideration of defendant's motion for judgment notwithstanding the verdict, and

upon petition for defendant for new trial herein; R. L. Edmiston appearing for plaintiff, and Hamblen & Gilbert appearing for defendant, and the Court having heard said petition and argument of counsel herein and having considered same, it is now here

ORDERED that plaintiff's said petition for rehearing and consideration of said motion and petition be, and the same is now denied. Plaintiff excepts and exception allowed.

FRANK H. RUDKIN,
Judge.

Filed in U. S. District Court, Eastern District of Washington. August 28, 1919. Wm. W. Hare, Clerk. By H. J. Dunham, Deputy. **[78]**

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION CO., a Corp.,

Defendant.

**Judgment.**

This case coming regularly on for hearing upon the motion of the defendant for judgment setting aside the verdict of the jury heretofore rendered herein and dismissing the above-entitled action in accordance with stipulation made and entered into between the

respective parties in the above court prior to the submission of said cause to the jury, and the Court having heard the argument of counsel and taken said cause under advisement and filed herein its written opinion and decision,—

IT IS ORDERED, That the verdict of the jury in the above-entitled action heretofore rendered on June 26, 1919, in favor of the plaintiff and against the defendant, be and the same is hereby set aside; and,

IT IS HEREBY ORDERED AND ADJUDGED, That notwithstanding said verdict of the jury, plaintiff's complaint herein be dismissed and that the defendant have and recover its costs and disbursements herein expended, to all of which plaintiff excepts and exception allowed.

Done in open court this 28th day of August, 1919.

FRANK H. RUDKIN,
District Judge.

Service of the within is hereby acknowledged this 29th day of August, 1919.

R. L. EDMISTON,
Attorney for Plaintiff.

Filed in U. S. District Court, Eastern District of Washington. August 28, 1919. W. W. Hare, Clerk. By H. J. Dunham, Deputy. **[79]**

*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,

Defendant.

**Stipulation for Enlargement of Time to November 1, 1919, for Filing Bill of Exceptions.**

It is hereby stipulated by and between the plaintiff and defendant herein, by their respective attorneys, that the plaintiff (having served and filed a transcript of the evidence and proceedings at the trial of this cause, and of all proceedings subsequent thereto, to date), may have to and including November 1st, 1919, to prepare, serve and file a proposed bill of exceptions in the above-entitled cause for review of the judgment rulings herein by the Circuit Court of Appeals on Writ of Error

R. L. EDMISTON,
Attorney for Plaintiff.
HAMBLEN & GILBERT,
Attorney for Defendant.

Allowed:

RUDKIN,
Judge.

Filed September ——, 1919. [80]

Plaintiff duly excepted to the rendering and entering of judgment in the above-entitled action, ordering and adjudging that the verdict of the jury duly returned and rendered herein June 26, 1919, in favor of plaintiff and against defendant for $1,870.00, be and thereby was set aside, and adjudging that, notwithstanding said verdict, plaintiff's complaint herein be dismissed and the defendant have its costs and disbursements herein, which judgment was dated August 28th, 1919, which exception thereto was duly allowed by the Court.

Now, in furtherance of justice and that right may be done, the plaintiff presents the foregoing as his Bill of Exception in this case, and prays that the same may be settled, allowed, signed and certified, by the judge of said Court and filed as a bill of exception, as provided by law.

R. L. EDMISTON,
Attorney for Plaintiff.

Due service, the within and foregoing Bill of Exceptions by a true copy thereof is hereby admitted at Spokane, Washington, this 21st day of October, A. D. 1919.

HAMBLEN & GILBERT,
Attorneys for Defendant,

Lodged and filed October 21st, 1919. W. H. Hare, Clerk. [81]

*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,

Defendant.

**Order Settling Bill of Exceptions.**

Now, on this 1st day of November, 1919, the above cause coming on for hearing on the application of plaintiff for an order settling the bill of exceptions in said cause, served on defendant's attorneys and lodged with the clerk of this court on the 21st day of October, 1919; plaintiff appearing by R. L. Edmiston, his attorney, and defendant appearing by Hamblen and Gilbert, its attorneys; and it appearing to the Court that plaintiff's proposed bill of exceptions, was duly served on the attorneys for defendant within the time provided by law, and the order of the Court, and that no amendments have been suggested thereto by the defendant, and that time for settling said bill of exceptions has not expired, and it further appearing to the Court that said bill of exceptions contains all of the material facts occurring on the trial of said cause, together with the exception thereto, and all the material matters and things occurring upon the trial including a copy of the exhibits introduced in evidence by both plaintiff and defendant which ex-

hibits are hereby made a part of said bill of exceptions; and it appearing that the original exhibits are or may be important to aid the Court of Review, the clerk of this court is hereby ordered and instructed to attach and send up the original exhibits herein.

Therefore, upon motion of R. L. Edmiston, attorney for plaintiff, it is NOW HERE ORDERED, that the said proposed Bill of exceptions be, and the same is hereby, allowed and settled as a true bill of exceptions in said cause, and that same is hereby CERTIFIED accordingly, by the undersigned Judge of this court, who presided [82] at the trial of said cause, and that it conforms to the truth and that it is in proper form, and that it is a full, true, and correct bill of exceptions; and the clerk of this court is hereby ordered to file the same as a record in said cause, and transmit the same to the Honorable *Circuit of* Appeals for the Ninth Circuit.

FRANK H. RUDKIN,
District Judge.

Copy received November 1st, 1919.

HAMBLEN & GILBERT,
Attorneys for Defendant.

Filed in the United States District Court. November 1st, 1919. W. H. Hare, Clerk. H. J. Dunham, Deputy. [83]

*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

**Petition for Order Allowing Writ of Error.**

J. B. McGinn, plaintiff in the above-entitled cause, feeling himself aggrieved by the rulings of the Court and by the judgment of the Court, entered herein on the 28th day of August, A. D. 1919, setting aside the verdict of the jury for eighteen hundred seventy dollars ($1870.00), returned in favor of plaintiff on June 26th, 1919, and dismissing said cause in the said U. S. District Court, with costs against plaintiff, complaines in the record and proceedings had in said cause and also of the rendition of the said judgment therein, that manifest error hath happened to the great damage of said plaintiff, NOW HERE PETITIONS said Court for orders allowing said plaintiff to prosecute a writ of error to the Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf, made and provided; and also that an order be made fixing the amount of the security for costs which the plaintiff shall give and furnish upon said writ of error, and

that upon giving such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said United States District Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated this 1st day of November, A. D. 1919.

R. L. EDMISTON,
Attorney for Plaintiff.

Due service of the foregoing petition by true copy thereof is now here admitted in Spokane, Washington, this 1st day of November, A. D. 1919.

HAMBLEN & GILBERT,
Attorneys for Defendant.

Filed in United States District Court. Nov. 1st, 1919. W. H. Hare, Clerk. H. J. Dunham, Deputy.

[84]

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

**Assignment of Errors.**

Comes now plaintiff and serves and files Assignments of Error herein upon which he will rely in the

prosecution of the Writ of Error in the above-entitled Cause, from the adverse rulings at the trial and from the judgment rendered by said Court on the 28th day of August, 1919, as follows, to wit:

I.

The United States District Court in and for Eastern District of Washington, Northern Division, erred in sustaining defendant's objection to the question to plaintiff as witness in his own behalf:

Q. "State what was said and done between you and the agent at Walla Walla, when you took over the horses," for the following reasons: (B. of Ex. 7.)

a. Plaintiff was thereby deprived of the right to give evidence of the AGREEMENT for payment of damages as a condition of plaintiff's taking over thirty-eight (38) head of the forty-nine (49) horses and mules, and the value of the eleven (11) dead, and undelivered, head, as set forth in paragraphs five and seven of the Complaint.

b. Plaintiff was thereby deprived of the right to give evidence of the relation of debtor and creditor assumed by defendant as existing between plaintiff and defendant in the demand made for payment of freight and feed charges from Grand Island, Neb., to Spokane, Washington, except as same appears in receipted freight and feed bills; being Plaintiff's Exhibit No. 4, consisting of seven sheets. (B. of Ex. 16–16d.) **[85]**

II.

That the Court erred in sustaining defendant's motion to strike testimony of witness Brandell as to talk with conductor at Glenns Ferry, Idaho, requesting

the cars of horses and mules to be set out for rest, water and feed touching the sick condition of the animals *the* apparent for the reasons: (B. of Ex. 11.)

a. Such talk was within the allegations of the Complaint and the contents of the amended bill of particulars.

b. Plaintiff had a right to show efforts made to have the animals given rest and medical attention upon first knowledge of their sickness.

III.

The Court erred at close of plaintiff's testimony in WITHDRAWING ALL ISSUES from the jury except that of quality of the hay fed at Pocatello, Idaho, and whether or not Railway Company furnished it, for the following reasons:

a. Paragraph VI of answer admits that 48 hours and 25 minutes elapsed between the reloading at Pocatello, Idaho, and reloading at Huntington, Oregon.

b. Witness Brandell stated that the cars were held three or four hours on the tracks at Huntington, before being switched to the yards for unloading. (B. of Ex. 11.)

c. Requests were made to be set out at Weiser as the 36 hours were up. (B. of Ex. 11.)

d. The bill of lading called for rest and feed at Caldwell, 75 miles east of Huntington, and 253 miles west of Pocatello. (B. of Ex. 11.)

e. Caretaker had no authority under the circumstances to sign 36-hour release, and no facts were shown bringing this shipment within scope of the

statute, giving caretaker authority to sign 36-hour releases.

f. Failure of defendant to deliver shipment at destination and failure to deliver at all, those eleven horses and mules that [86] died in transit of the value at Walla Walla of $1,870.00, including freight.

g. Defendant had demanded and received as a creditor of plaintiff the full freight and charges from Grand Island, Neb., to Spokane, Wash.

IV.

The Court erred in overruling plaintiff's objection to the admission of Defendant's Exhibits "A" and "B" for (B. of Ex. 26) the reason:

a. G. F. Brandell was only caretaker and had no authority other than stated in the bill of lading and had no authority to sign plaintiff's name or in any such manner bind plaintiff.

b. The said exhibits and testimony fail to show any emergency of valid excuse or reason required by law to exist for the giving of such releases and no necessity is shown for the same as required by law, and same conflicts with purpose of 28-hour law.

V.

The Court erred in granting defendant's motion for judgment notwithstanding the VERDICT and for judgment of dismissal of this Cause and in rendering its opinion in that behalf (B. of Ex. 34–40), for the reason:

a. That a cause of action had been proven by plaintiff against defendant, and the law and facts submitted to the jury and by the jury decided for plain-

tiff and against defendant in its VERDICT for $1,870.00 damage.

b. The negligence and liability of defendant is shown by the evidence, admission, and face of bill of lading, and by freight bills; and also that defendant is part of the Union Pacific System.

c. Defendant permitted the cars to stand at Huntington three or four hours before switching so as to be unloaded at yards for feed and rest.

d. Failure to deliver those horses and mules that died in transit. [87]

e. Failure to deliver any of the shipment of 49 head at Spokane, the destination.

f. Demanding and receiving freight and feed charges in defendant's own name and behalf for the shipment of the 49 head from Grand Island, Neb., to Spokane, Washington.

g. Agreement of defendant with plaintiff as to damages at time plaintiff accepted delivery of a part of said shipment at Walla Walla.

h. Evidence showed defendant to be a factor and inte*frial* part of Union Pacific System; and also to be the agent, factor and inte*frial* part of a legal system for this shipment composed of initial and intermediate carriers with defendant under the interstate shipment laws, and the negligence of furnishing and feeding rotten and unwholesome hay and feed at Pocatello, Idaho, is i*m*puted to and becomes the negligent acts of defendant in each, and both of said capacities.

i. Defendant has a right of recoupment from initial and intermediate carriers of the Union Pacific

System, and its conduct in assuming relation of debtor and creditor, collecting all freight and charges, etc., constitutes an estoppel in law on defendant to deny liability.

j. The authorities cited in support of said ruling and decision of the Court are inapplicable to facts herein and are in conflict with decisions of the United States Supreme Court in that behalf.

k. Plaintiff was entitled to judgment upon the verdict. (B. of Ex. 36–40.)

VI.

The Court erred in overruling plaintiff's PETITION for reargument of defendant's motions for judgment, notwithstanding the verdict and the Court's 8 ruling thereon, for reasons therein stated. (B. of Ex. 42–41.)

VII.

The Court erred in rendering and entering judgment herein, setting aside the verdict of the jury awarding plaintiff $1870.00 **[88]** damage, and dismissing this action with costs against plaintiff; for the reason same is contrary to the law, the evidence and the verdict of the jury herein.

WHEREFORE, the said J. B. McGinn, plaintiff in error, prays that the judgment of the said District Court be reversed and that said District Court be directed to overrule defendant's motion for new trial and for judgment notwithstanding the verdict, and to render and enter judgment for this plaintiff in error on the verdict of the jury herein, and for his costs and disbursement.

R. L. EDMISTON,
Attorney for Plaintiff in Error.

Service of the foregoing assignments of error is hereby admitted at Spokane, Washington this 1st day of Nov., 1919.

HAMBLEN & GILBERT,
Attorneys for Defendant in Error.

Filed in the United States District Court. November 1st, 1919. W. H. Hare, Clerk. H. J. Dunham, Deputy. **[89]**

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON - WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corporation,

Defendant.

**Order Allowing Writ of Error.**

Upon motion of R. L. Edmiston, attorney for plaintiff, and upon filing a petition for writ of error and assignment of error, IT IS NOW HERE ORDERED, That a writ of error be, and hereby is allowed, to have reviewed in the United States Circuit Court of Appeal for the Ninth Circuit the judgment setting aside the verdict of the jury and dismissing said cause heretofore entered herein, and that the amount of bonds on said writ of error for security for costs be and hereby is fixed at the sum of Two Hundred

Dollars ($200.00), which said bond shall be approved by the Judge of the said District Court and a stay of execution is hereby granted against the judgment for costs herein pending the determination of such writ of error.

Dated this 1st day of November, A. D. 1919.

FRANK H. RUDKIN,
District Judge.

Service of the foregoing order by true copy thereof is hereby admitted in Spokane, Washington, this 1st day of November, A. D. 1919.

HAMBLEN & GILBERT,
Attorney for Defendant.

Filed in the United States District Court, November 1st, 1919. W. H. Hare, Clerk. H. J. Dunham, Deputy. **[90]**

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corp.,

Defendant.

**Writ of Error.**

The President of the United States of America, to the Honorable the Judge of the District Court of the United States for the Eastern Division of Washington, Northern Division, GREETINGS:

Because in the record and proceedings, as also in the rendition of the judgment setting aside the verdict of the jury and dismissing the cause of action, which is in the said District Court before you at the May, 1919, term thereof, between J. B. McGinn, plaintiff, and the Oregon-Washington Railroad and Navigation Company, a corporation, defendant, manifest error hath happened to the great damage of said J. B. McGinn, plaintiff in error, as by his complaint appears;

We being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your *sale*, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, on the —— day of —— next, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceeding aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 1st day [91] November, A. D. 1919, of the Independence of the United States the one hundred forty-fourth (144) year.

_____,

Clerk of the District Court, Eastern District of Washington, Northern Division.

Allowed this 1st day of November, A. D. 1919.

FRANK H. RUDKIN,
District Judge.

Service of the foregoing writ of error by receipt of copy thereof is hereby admitted this 1st day of November, A. D. 1919.

HAMBLEN & GILBERT,
Attorney for Defendant.

Filed in the United States District Court, November 1st, 1919. W. H. Hare, Clerk. H. J. Dunham, Deputy. [92]

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,
Plaintiff,

vs.

OREGON - WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corporation,
Defendant.

**Order Fixing Amount of Bond on Writ of Error.**

Plaintiff J. B. McGinn having this day filed his petition for a writ of error from the rulings, decision and judgment made and entered in said action to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security for costs which plaintiff should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit, and said petition having been this day duly allowed;

NOW, THEREFORE, IT IS ORDERED, that upon the said plaintiff J. B. McGinn filing with the clerk of this court a good and sufficient bond in the sum of Two Hundred Dollars ($200.00) to the effect that if the said plaintiff in error shall prosecute said writ of error to effect, and answer all costs if he fails to make his plea good, then the said obligation to be void, otherwise to remain in full force and virtue, the said bond to be approved by the said District Court; that all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 1st day of November, A. D. 1919.

FRANK H. RUDKIN,
District Judge.

Service of the foregoing order by a true copy thereof is hereby admitted at Spokane this 1st day November, A. D. 1919.

HAMBLEN & GILBERT,
Attorneys for Defendant. **[93]**

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corp.,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that we, J. B. McGinn, as principal, and Fidelity and Deposit Co. of Maryland, a corporation duly incorporated under the laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the Oregon-Washington Railroad and Navigation Company, defendant herein, in the full and just sum of two hundred dollars ($200.00), to be paid to the said defendant, its successors or assigns; for which, well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 1st day of November, 1919.

WHEREAS the above-names plaintiff, J. B. McGinn, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the said District Court of the United States for the Eastern District of Washington, Northern Division, rendered herein on the 28th day of August, A. D. 1919.

NOW, THEREFORE, the condition of the above obligation is such that if the said J. B. Mc*F*inn, plaintiff in error, shall prosecute his writ of error to effect and answer all costs, awarded against him if he fails to make his plea good, then the said obligation to be void; otherwise to remain in full force and effect.

J. B. McGINN,
FIDELITY AND DEPOSIT CO., of MARYLAND.
By S. M. SMITH,
Attorney of Fact.
Attest: W. L. BERRY.

Approved November 1st, 1919
FRANK H. RUDKIN,
Judge. **[94]**

*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,

Plaintiff in Error.

vs.

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a Corp.,

Defendant in Error.

**Citation on Writ of Error.**

The President of the United States to the Above-named Defendant and to Hamblen and Gilbert, Attorneys for Defendant in Error.

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, in the State of California, within thirty (30) days from the date hereof pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein J. B. McGinn is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this —— day of

November, A. D. 1919, and the Independence of the United States, the 143d.

[Seal] FRANK H. RUDKIN,
Judge.

United States District Judge for the Eastern District of Washington.

Attest: W. W. HARE,
Clerk.

Service of the foregoing citation, by a copy thereof, is hereby admitted at Spokane, Washington, this 1st day of November, A. D. 1919.

HAMBLEN & GILBERT,
Attorneys for Plaintiff in Error.

Filed in the United States District Court, Nov. 1st, 1919. W. H. Hare, Clerk. H. J. Dunham, Deputy. **[95]**

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 3062.

J. B. McGINN,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corp.,
Defendant.

**Praecipe for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare and send to the Clerk of

the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the following papers and documents on file herein constituting the record in the above-entitled cause, in support of the writ of error and citation sued out by J. B. McGinn, plaintiff in error, to wit:

1. Complaint (omitting interrogatories).
2. Order of removal from State court.
3. Amended bill of particulars.
4. Demurrer to the complaint.
5. Order overruling demurrer March 4, 1919.
6. Answer of defendants.
7. Reply of plaintiff.
8. Stipulation June 17, 1919.
9. Verdict.
10. Judgment.
11. Bill of exceptions (including all documents and exhibits set out herein).
12. Order settling bill of exceptions.
13. Petition for order allowing writ of error.
14. Assignments of error.
15. Order allowing writ of error.
16. Writ of error.
17. Order fixing amount of bond.
18. Bond.
19. Citation.
20. Praecipe.

And oblige J. B. McGinn, plaintiff in error and

R. L. EDMISTON,
Attorney for Plaintiff in Error.

Service of foregoing by copy admitted this 5th day of Nov., 1919.

HAMBLEN & GILBERT,
Attorney for Defendant in Error.

Filed November 7th, 1919. W. H. Hare, Clerk.

**[96]**

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a true and correct copy of the records, pleadings, testimony and all the proceedings had in said action, as called for by plaintiff in error in his praecipe for a transcript of record in said District Court, and that the same which I herewith transmit constitutes my return to the enclosed original writ of error, lodged and filed in my office on the 1st day of November, 1919. I also transmit herewith the original writ of error, and original citation in said action.

I further certify that the cost of preparing and certifying the foregoing transcript amounts to the sum of Thirty-seven and 85/100 ($37.85) dollars, which sum has been paid in full by R. L. Edmiston, attorney for plaintiff and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at

the city of Spokane, in the *in the* Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 10th day of November, 1919, and in the Independence of the United States of America the one hundred and *f*irty-fourth.

[Seal] (Signed) W. H. HARE,
Clerk U. S. District Court for the Eastern District of Washington. [97]

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[Endorsed]: No. 3412. United States Circuit Court of Appeals for the Ninth Circuit. J. B. McGinn, Plaintiff in Error, vs. Oregon-Washington Railroad & Navigation Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed November 13, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed December 4, 1919. F. D. Monckton, Clerk.

No. 3412

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

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J. B. McGINN,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

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**Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.**

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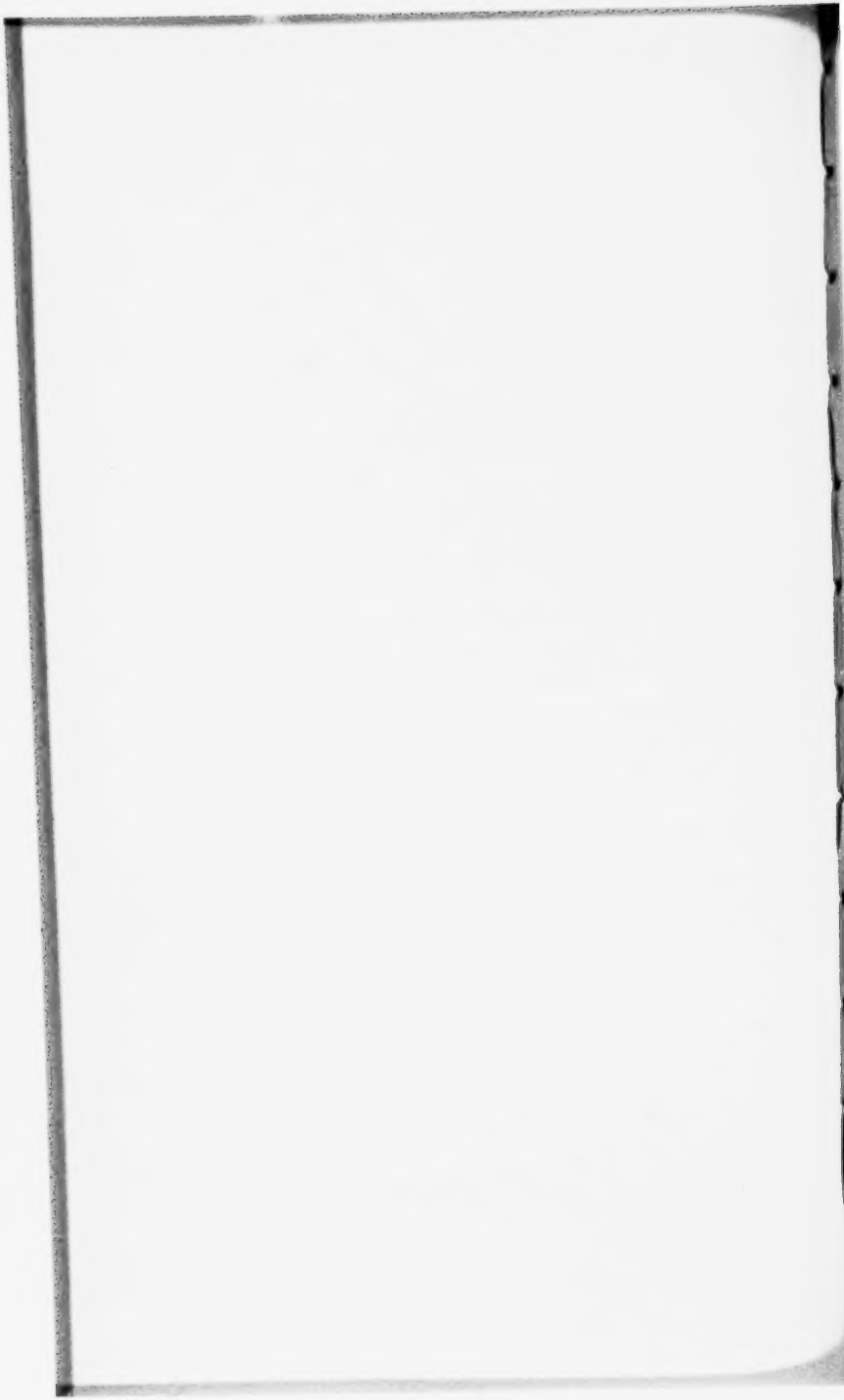
## PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.



At a stated term, to wit, the October term, A. D., 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the tenth day of February, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge; The Honorable CHARLES E. WOLVERTON, District Judge.

No. 3412.

J. B. McGINN,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

**Order of Submission.**

Ordered above-entitled cause argued by Mr. R. L. Edmiston, counsel for the plaintiff in error, and by the defendant in error, and by Mr. W. I. Gilbert, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D., 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the eighteenth day of May, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * J. B. McGinn, Plaintiff in Error, vs. Oregon-Washington Railroad & Navigation Company, a Corporation, Defendant in Error. No. 3412.

* * *

United States Circuit Court of Appeals for the Ninth Circuit.

3412.

J. B. McGINN,

Plaintiff in Error,

v.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

**Opinion U. S. Circuit Court of Appeals.**

R. L. EDMISTON, for Plaintiff in Error;

A. C. SPENCER, J. F. REILLY, and HAMBLEN & GILBERT, for Defendant in Error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge:

This is an action instituted by plaintiff in error against the defendant in error to recover damages for loss and injury to certain livestock, namely, 49 head of horses and mules, shipped by plaintiff in error from Grand Island, in Nebraska, under a bill of lading issued by the Union Pacific Railway Company for transportation over its railway and connecing lines to Spokane, Washington. The connecting lines were the Oregon Short Line Railroad and the defendant in error, the Oregon–Washington Railroad and Navigation Company. Reference will hereafter be made to the parties as plaintiff and defendant

The live stock contract under which the stock was shipped contains the following provisions:

"Except as otherwise provided by statute law, the carrier undertakes to transport said shipment only over its own line, and acts only as the agent of the shipper with respect to the portion of the route beyond its own line. No carrier shall be liable for damages for loss, death, injury or delay to said animals, or any thereof, not caused by it, but nothing contained in this contract shall be deemed to exempt the initial carrier in case of a through interstate transportation from and liability for loss, death, damage or injury caused by it or any common carrier, railroad or transportation company to which the livestock may be delivered under this contract. * * *

"The shipper will, at his own risk and expense, load, unload, care for, feed and water the stock, until delivery of the same to consignee at destination, and will furnish to go with the stock for that purpose, one or more attendants, according to the rules of the carrier, and if the shipper fails to furnish such attendant, or if the latter neglects to perform said duties, whatever shall be done by the carrier in respect to the handling and care of the stock in transit, shall be considered as done by it at the request and as the representative of the shipper, and at the risk and expense of the shipper. * * *

"Unless notice of claim for shrinkage, detention, delay, loss or death of, or damage or injury to said livestock is presented in writing

to the station agent of the carrier at the point of delivery, or at point of origin, within ninety days from the unloading of said stock at destination, or in case of failure to make delivery, then within ninety days after a reasonable time for delivery has elapsed, and such notice be supplemented by shipper within four months from said date of unloading at destination, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, by filing with said agent definite claims in writing specifying character and amount of claim, such claim shall be deemed to have been waived, and each carrier participating in the service performed or called for by this contract shall be discharged for liability; provided however, that if loss, damage or injury complained of was due to delay or damage caused or contributed to by the carrier, or its employees, while being loaded or unloaded, or if damaged in transit by carelessness or neglect of the carrier, or its employees, then no notice of claim or filing of claim shall be required as a condition precedent to recovery."

The evidence tends to show that at Pocatello, in Idaho, a station on the line of the Oregon Short Line, the animals were fed hay that was musty and moldy, and unfit for such use, and were given water to drink which was unwholesome for the purpose, and that by reason thereof they became sick and emaciated, and that eleven head of them died, four before delivery to the plaintiff at Walla Walla, Washington, and

seven shortly thereafter. The stock was discovered to be in bad condition before reaching Huntington, Oregon, and one of them died in the stockyards at that place. Huntington is the eastern terminus of the Oregon–Washington Railroad & Navigation Company. Because of the bad condition of the stock, they were delivered to plaintiff at Walla Walla, before reaching their destination. Plaintiff says he "received them and paid the freight under protest."

There was a stipulation between counsel which, among other things, recites that the defendant herein "is a part of the Union Pacific System of Railways." At the head of the livestock contract is found this legend: "Union Pacific Railroad Company. Oregon Short Line Railroad Company. Oregon–Washington Railroad & Navigation Company." And a witness, the O.–W. R. & N. Company's agent at Walla Walla, testified that "The Union Pacific is the parent company; the others are subsidiary lines."

On a motion for a nonsuiit and discharge of the jury, made by defendant at the conclusion of plaintiff's testimony, the Court limited the inquiry thenceforth to whether or not the hay was actually furnished by the railroad company and respecting its quality, and denied the motion.

When both parties had rested, the Court submitted the cause to the jury under instructions, the parties through their counsel having stipulated that the question of sufficiency of the evidence may be considered by the Court upon a motion for judgment notwithstanding the verdict, in case the jury returned a verdict in favor of the plaintiff. The jury

returned a verdict for the plaintiff in the sum of $1,870. On motion of defendant for judgment in its favor, notwithstanding the verdict, the verdict was set aside by the court, and a judgment rendered dismissing the action.

The controlling question presented for our consideration is whether the District Court erred in sustaining the defendant's motion and entering a judgment dismissing the complaint non obstante vere*dicto*. This depends upon whether the defendant can be held liable under the livestock contract in view of what is commonly known as the Carmack amendment of January 29, 1906. C. 3591, § 7, 34 Stat. at Large, 584, 595. That amendment requires the carrier receiving the property for transportation from a point in one state to a point in another state to issue its receipt or bill of lading therefor, and renders it liable to the lawful holder for any loss, damage or injury to such property caused by it or any common carrier railroad or transportation company to which such property may be delivered, or over whose lines it may pass, but preserves to the holder of such receipt or bill of lading every remedy or right of action which he has under existing law. The section likewise entitles the common carrier issuing the receipt or bill of lading to recover from the common carrier, railroad, or transportation company on whose lines the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment, or transcript thereof.

Previous to the Carmack amendment, the carrier could lawfully contract to carry to destination, even though the transportation were to be over its own and connecting lines. In such event, it constituted the connecting carriers its agents, and thereby rendered itself liable for loss or damages occasioned by any of the connecting carriers, for the obvious reason that the principal is liable for the acts of its agents. The carrier could, however, by contract, lawfully limit its liability to safe carriage over its own line only. In such event, the connecting carriers became the agents of the shipper, and not of the initial carrier. The effect of the Carmack amendment is to deny to the carrier this privilege, and to render any such contract a nullity. On the other hand, the amendment creates an obligation on the part of the initial carrier to carry safely to restination, where the shipment is interstate, even though no contract is entered into between the parties, and renders it liable for loss or damage to the property occasioned by the connecting carriers. Such is, in effect, the holding of the Supreme Court in Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186. This holding has since been reaffirmed. Missouri, Kans. & Tex. Ry. Co. vs. Ward, 244 U. S. 383; Texas & P. Ry. Co. vs. Leatherwood, 39 Supreme Court Rep. 517. The last clause of section 20 of the act, as amended, likewise accords to the initial carrier a remedy against the connecting carrier by whose line the loss or damage is occasioned. This section, also, by preserving to the shipper all remedy and right of action he has

under existing law, explicitly sanctions such right and remedy.

It can hardly be asserted with confidence that, previous to the Carmack amendment, one of several connecting carriers could be charged with liability for damages accruing upon the line of another of such connecting carriers, which were not occasioned by the former. Nor do we understand that counsel makes any such contention here. The amendment does not, by any express declaration, purport to give such a right or remedy. While it does impose an obligation upon the initial carrier to answer in damages for loss occasioned by the successive connecting carriers, it does not impose any such obligation or liability upon a successive carrier for loss occurring upon the lines of other connecting carriers, for which it is in no way accountable primarily. Hudson vs. Chicago, St. P., M. & O. Ry. Co., 226 Fed. 38. The bill of lading issued by the initial carrier, with its accompanying contract, contains the controlling contractual relations of the parties, including the succeeding connecting carriers, and the terms of such relations cannot be varied or modified by a new bill of lading issued by any connecting carrier Missouri, Kans. & Tex. Ry. Co. vs. Ward, supra; Texas & P. Ry. Co. vs. Leatherwood, supra.

While the Carmack amendment does, in effect make the connecting carriers the agents of the initial carrier, it does not make the connecting carriers the agents of one another. The declaration of the court, in Atlantic Coast Line vs. Glenn, 239 U. S. 388, 393, that, "in the nature of things the power to constitute

an initial carrier the agent of the terminal carrier is not different from the power to make the terminal carrier the agent of the initial carrier," is not apposite here, as the declaration was made in view of a state statute. We find no exercise of any such power by the Carmack amendment as to constitute the connecting carriers, as among themselves, agents of one another, with responsibility for loss or damage occasioned by any one of the connecting lines.

But it is insisted by counsel that the defendant is liable for failure to deliver the stock in the condition in which it was received for shipment, and is therefore liable for the damages sustained by the shipper. The Supreme Court, in Georgia, Fla. & Ala. Ry. vs. Blish Co., 241 U. S. 190, 196, which was an action in trover to recover against the terminal company for a misdelivery and for the value of a carload of flour which had been damaged while in transit over the lines of the connecting carrier next preceding it, in further construing the Carmack amendment, was of the opinion, and so declared, that the statute was comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation, including delivery, and the Court goes on to say:

> "When it [the initial carrier] inserts in its bill of lading a provision requiring reasonable notice of claims 'in case of failure to make delivery' the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to

be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms (Kansas Southern Ry. vs. Carl, supra; Southern Railway vs. Prescott, supra); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery. The clause gave abundant opportunity for presenting claims and we regard it as both applicable and valid."

So that, under the amendment, the terminal carrier is bound, by the bill of lading and the contract of the initial carrier, to deliver as the initial carrier is bound, and is liable for any loss or damage to the property that has been occasioned through the conduct of the carriers while in transit. This leads to the conclusion that the defendant here, being a terminal carrier, is liable for the loss and injury to the stock comprised by the shipment, although occasioned while it was in transit over the Oregon Short Line.

Question is made that the form and theory of action adopted by plaintiff admit of no such relief, as it is said not to be for misdelivery, but for damages caused by the negligence of one of the carreirs. The form of action has the sanction of the Court in Geor-

gia, Fla. & Ala. Ry. vs. Blish Co., supra. There the action was in trover, but the Court was persuaded that it should look beyond the technical denomination of the pleading and treat it as one for damages against the delivering carrier. Such is the action here, not only in name, but in substance.

Having concluded that the defendant is rendered thus liable, it is not necessary to discuss the questions presented as to whether defendant was, in effect, a partner of the initial and succeeding carriers, or is otherwise liable because of shipping and other inter-relations of the several connecting carriers. Nor is it essential to decide the questions arising upon objections and exceptions made and reserved during the trial.

The judgment of the District Court will be reversed, and the cause remanded, with directions to enter judgment for the plaintiff upon the verdict rendered by the jury.

[Endorsed]: Opinion. Filed May 18, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3412.

J. B. McGINN,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

**Judgment U. S. Circuit Court of Appeals.**

In error to the District Court of the United States for the Eastern District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the plaintiff in error and against the defendant in error, and that this cause be, and hereby is remanded to the said District Court, with directions to enter judgment for the plaintiff upon the verdict rendered by the jury.

It is further ordered and adjudged by this Court that the plaintiff in error recover against the defendant in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and Entered May 18, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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At a stated term, to wit, the October term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the seventh day of September, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding, The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3412.

J. B. McGINN,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

**Order Denying Petition for Rehearing.**

On consideration thereof, and by direction of the Honorable William B. Gilbert, and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the cause was heard, it is ORDERED that the petition, filed June 14, 1920, on behalf of the defendant in error for a rehearing of the above-entitled cause be, and hereby is denied.

In the United States Circuit Court of Appeals for the Ninth Circuit.

J. B. McGINN,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

**Praecipe for Transcript of Record.**

To the Clerk of the above-entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

(1) The record in said cause on writ of error from the District Court of the United States for the Eastern District of Washington, Northern Division, to the above-entitled Court.

(2) The opinion of the above-entitled Court.

(3) The judgment of the above-entitled Court entered in pursuance of said opinion.

(4) The petition for a rehearing filed by defendant in error.

(5) The judgment order overruling said petition.

(6) All journal entries contained in the records and proceedings of the above-entitled Court relating to said cause.

(7) Your certificate to the record that it is a complete record in said cause.

(8) Nine uncertified copies containing all of the foregoing.

Dated this 27th day of October, 1920.

A. C. SPENCER.
JOHN F. REILLY.

Attorneys for Oregon–Washington Railroad & Navigation Company, Defendant in Error.

[Endorsed]: Praecipe for Transcript of Record. Filed October 29, 1920. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3412.

J. B. McGINN,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

**Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.**

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and thirty-six (136) pages, numbered from and including 1 to and including 136, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, excluding all original exhibits, made pursuant to praecipe of counsel for the defendant in error, filed October 29, 1920, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 3d day of November, A. D. 1920.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which J. B. McGinn is plaintiff in error, and Oregon-Washington Railroad & Navigation Company is defendant in error, No. 3412, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Washington, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second-day of December, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

[Endorsed:] File No. 27,974. Supreme Court of the United States, October Term, 1920. No. 617. Oregon-Washington Railroad & Navigation Company vs. J. B. McGinn. Writ of Certiorari. No. 3412. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 20, 1921. F. D. Monckton, clerk, by Paul P. O'Brien, Deputy clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3412.

J. B. McGINN, Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation, Defendant in Error.

*Stipulation as to Return to Writ of Certiorari.*

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States with the

petition for the writ of certiorari be taken as a return to said writ dated the 22nd day of December, 1920.

Dated this 7th day of January, 1921.

(Sgd.) R. L. EDMISTON,
*Attorneys for Plaintiff in Error.*

(Sgd.) JOHN F. REILLY,
*Of Attorneys for Defendant in Error.*

[Endorsed:] Stipulation as to return to writ of certiorari. Filed January 20, 1921, F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3412.

J. B. McGINN, Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation, Defendant in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari", filed in the above entitled cause on the 20th day of January, A. D. 1921, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of January, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk,*
By PAUL P. O'BRIEN,
*Deputy Clerk.*

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3412.

J. B. McGINN, Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation, Defendant in Error.

*Return to Writ of Certiorari.*

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari, issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ a certified copy of:

(1) Stipulation as to Return to Writ of Certiorari, the original of which said Stipulation was filed in said cause on the 20th day of January, A. D. 1921; and

(2) Plaintiff's Exhibits Nos. 2 and 4, and Defendant's Exhibits "A" and "B", filed November 13, 1919,

and in accordance with said stipulation, do hereby send the certified copy thereof, together with the original exhibits, to the said Supreme Court as the Return to the said Writ of Certiorari.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of January, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk,*
By PAUL P. O'BRIEN,
*Deputy Clerk.*

[Endorsed:] File No. 27,974. Supreme Court U. S., October Term, 1920. Term No. 617. Oregon-Washington Railroad & Navigation Co., Petitioner, vs. J. B. McGinn. Writ of certiorari and return. Filed Jan. 26, 1921.

No. 6[redacted]170

JAMES D. MAHER
CLERK

# In the Supreme Court of the United States

October Term, 1920

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Petitioner,

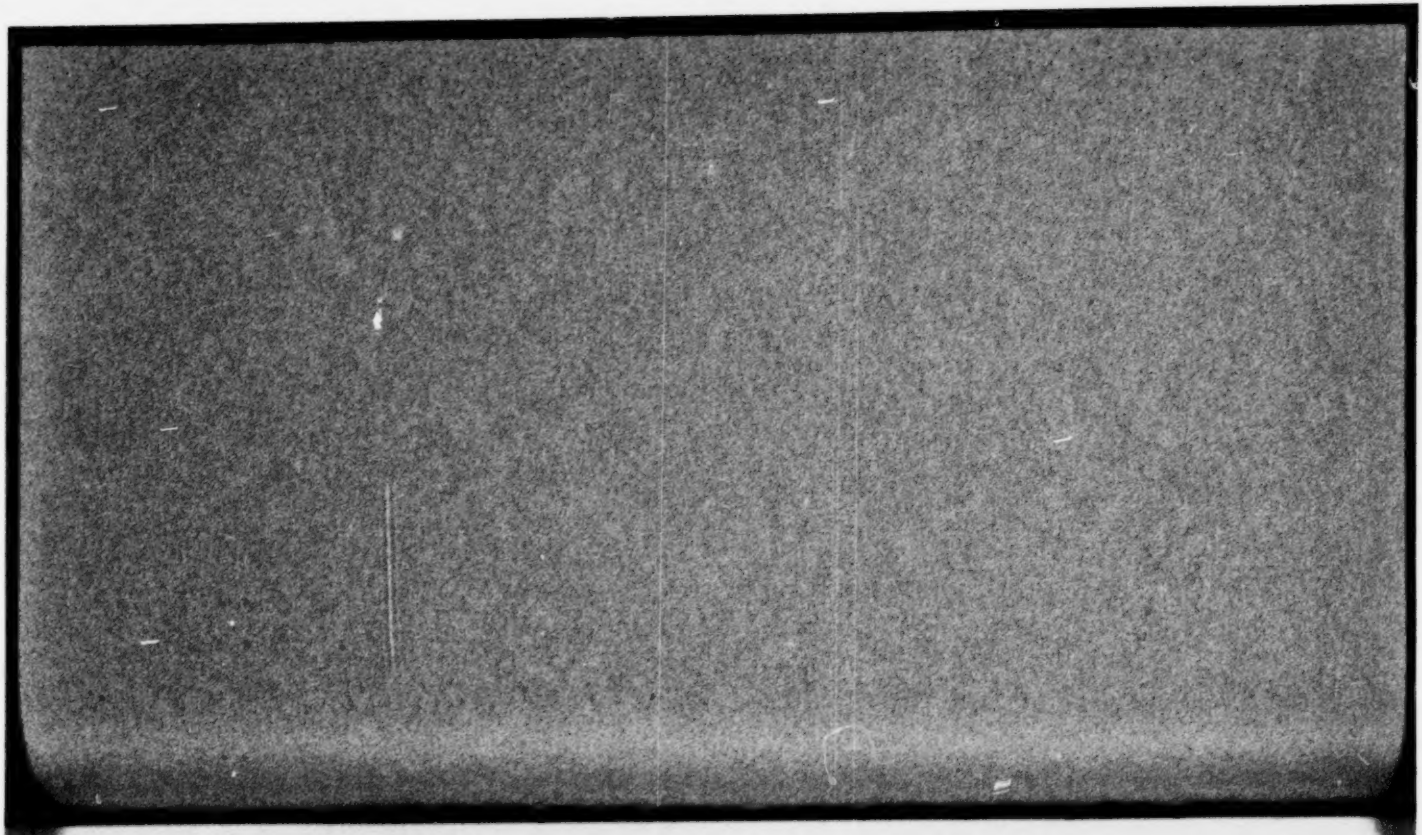
vs.

J. B. McGINN,

Respondent.

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

A. C. SPENCER,
C. E. COCHRAN,
JOHN F. REILLY,
Counsel for Petitioner.



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# In the Supreme Court
of the
# United States

October Term, 1920

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Petitioner,

vs.

J. B. McGINN,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Oregon-Washington Railroad & Navigation Company, a corporation of the State of Oregon, respectfully presents this its petition for a Writ

of Certiorari addressed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court and the Clerk thereof to certify to this Court the record and proceedings of the case in said Court wherein your petitioner was defendant in error and respondent, J. B. McGinn, was plaintiff in error, together with its opinion therein for the review and determination of said cause by this Court.

The reasons relied on for the issuance of said writ are the following:

*First:* The said Circuit Court of Appeals in an action against a delivering carrier to recover for damage to a shipment occurring on the line of a preceding carrier, misinterpreted the Carmack Amendment to the Interstate Commerce Act (34 Stat. L. 584) by holding that under said Carmack Amendment "the defendant here, being a terminal carrier, is liable for the loss and injury to the stock comprised by the shipment, although occasioned while it was in transit over the Oregon Short Line," and also misinterpreted the decisions of this Court, particularly the following:

Missouri, etc., R. R. Co. vs. Ward, 244 U. S. 383, 386-387.

Charleston, etc., R. Co. vs. Varnville Co., 237 U. S. 597.

Atchison, etc., Co. vs. Harold, 241 U. S. 371.

Georgia, etc., Co. vs. Blish Co., 241 U. S. 190.

Atlantic Coast Line R. R. Co. vs. Riverside Mills, 219 U. S. 186.

Adams Express Co. vs. Croninger, 226 U. S. 491, 504.

St. Louis, etc., Co. vs. Starbird, 243 U. S. 592.

*Second:* A conflict of decisions exists between the said Circuit Court of Appeals and the highest courts of numerous states in similar cases, as is evidenced by the following cases, each of which holds that under the Carmack Amendment the terminal carrier is not liable for the negligence of preceding carriers:

Henderson vs. Kansas Southern Ry., 85 Southern (La.) 625.

New York, etc., vs. Lewis Baer & Co., 84 Atl. (Md.) 251, 253.

Knapp vs. Minneapolis, etc., R. Co., 159 N. W. (N. D.) 81, 87.

Cedar Rapids Fuel Co. vs. Ill. Central R. Co., 160 N. W. (Iowa) 353, 354.

Emery & Co. vs. C. B. & Q. R., 170 N. W. (Iowa) 540.

Houston, etc., R. Co. vs. Reichardt, 212 S. W. (Texas) 208.

St. Louis, etc., R. Co. vs. Mounts, 144 Pac. (Okla.) 1036.

St. Louis, etc., R. Co. vs. Davis, 185 S. W. (Ark.) 478.

*Third:* There is a like conflict of decisions between said Circuit Court of Appeals and the District Court of the United States for the District of Minnesota, Third Division, as is evidenced by the case of Hudson vs. C., M. & St. P. R. Co., 226 Fed. 38, 42.

*Fourth:* The settlement of the question of liability of delivering carriers for the defaults of preceding carriers is of grave importance to shippers and carriers.

The pertinent facts of this action are as follows:

The action was commenced by Respondent in the Superior Court of Spokane County, Washington, against your petitioner as the sole defendant, praying for $5,500.00 damages on account of loss and damage to a shipment consisting of two cars of horses and mules transported by railroad from Grand Island, Nebraska, to Spokane, Washington, over the lines of Union Pacific Railroad Company, Oregon Short Line Railroad Company, and the line of your petitioner.

The complaint, with an amended bill of particulars, subsequently filed, recited as the cause of the alleged damage, that the animals were confined in the cars for periods in excess of twenty-eight hours and furnished musty hay and muddy water, all of which were alleged to have occurred on the railroads of Union Pacific Company and Oregon Short Line before delivery to your petitioner, and that as a result, the animals were dam-

aged. The shipment moved under a livestock contract containing a provision that no carrier other than the initial carrier, should be liable for damages for loss or damage not caused by it.

Your petitioner removed the case to the District Court of the United States for the Eastern District of Washington, Northern Division, on the sole ground of diversity of citizenship and thereafter a trial was had before a jury. Plaintiff produced testimony that the animals had been confined in cars for more than twenty-eight hours and improper feed and water furnished while on the Oregon Short Line. This was the only evidence of any negligence on the part of any carrier and no claim was made of any improper handling whatever on the line of your petitioner, but liability was sought to be imposed upon your petitioner on two theories: first, that it was a partner of the Oregon Short Line; and second, that as the delivering carrier it was liable for all defaults of preceding carriers.

The cause was submitted to a jury on the stipulation of the parties that in the event of a judgment for plaintiff (respondent) the Court might consider the sufficiency of the evidence on a motion for judgment notwithstanding the verdict. A verdict was returned for plaintiff (respondent) in the sum of $1870.00. A motion for judgment notwithstanding the verdict was made by your petitioner and allowed by the trial court, and judgment rendered in favor of your petitioner. In the decision on the motion the trial court observed that the plaintiff had shown "conclusively and beyond question

that the injury did not occur on the lines of the defendant" and held that the Carmack Amendment does not impose liability on the delivering or last carrier for any negligence except its own.

Respondent sued out a writ of error to the said Circuit Court of Appeals and that court reversed the judgment with directions to the District Court to enter judgment for the plaintiff (respondent) upon the verdict. In its decision the Circuit Court of Appeals held that notwithstanding the provisions in the bill of lading exempting each carrier, except the initial carrier, from liability for loss not caused by it, the terminal carrier, under the Carmack Amendment, was liable for all loss and damage occurring on the line of any preceding carrier. A petition for rehearing filed within the prescribed time was overruled by the Court on September 7, 1920.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous as is more fully set forth in the brief attached, and that this Honorable Court should require the case to be certified to it for its review and determination.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals had in said cause to the end that said cause

may be reviewed and determined by this Court as provided by law, and that said judgment of said Circuit Court of Appeals, and every part thereof, may be reversed by this Honorable Court, and that your petitioner may have such further relief as may seem appropriate. And your petitioner will ever pray.

A. C. SPENCER,

C. E. COCHRAN,
Hamblen & Gilbert
JOHN F. REILLY,

Wells Fargo Building,
Portland, Oregon,
Counsel for Petitioner.

State of Oregon, County of Multnomah—ss.

John F. Reilly, being first duly sworn, on oath, deposes and says: That he is one of counsel for petitioner; that he has read the foregoing Petition, and the facts therein stated are true as he verily believes.

JOHN F. REILLY,

Subscribed and sworn to before me this 3rd day of Nov., 1920.

W. A. ROBBINS,
Notary Public for Oregon.

(Seal)

My commission expires:
July 8, 1924

I do hereby certify that I prepared the foregoing Petition for a Writ of Certiorari, and in my opinion the said petition is well founded in law, and the case is one in which the prayer of the petition should be granted by the Court.

JOHN F. REILLY,
Of Counsel for Petitioner.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This is an action for damages against a delivering carrier for an injury to an interstate shipment occurring on the line of a preceding carrier. The shipment moved under a livestock contract which contained a provision that no carrier (except the initial carrier) should be liable for loss or damage not caused by it. The Circuit Court of Appeals ruled that petitioner, because it was the delivering carrier, was responsible under the Carmack Amendment to the Interstate Commerce Act for any loss or damage to the shipment occurring on line of any preceding carrier.

Although the complaint in the State Court contained allegations stating a case arising under the laws of the United States, it was removed by your petitioner to the Local District Court on the sole ground of diversity of citizenship.

## ARGUMENT

### I.

Certiorari is the only method by which this Court may review a decision of a Circuit Court of Appeals in a case removed from a state court to a Federal Court on the sole ground of diversity of citizenship.

Southern Pacific Co. vs. Stewart, 245 U. S. 359.

### II.

### THE CARMACK AMENDMENT TO THE INTERSTATE COMMERCE ACT DOES NOT IMPOSE LIABILITY ON A DELIVERING OR TERMINAL CARRIER FOR THE NEGLIGENCE OF PRECEDING CARRIERS.

The opinion of the Circuit Court of Appeals states that the Carmack Amendment does not by express declaration impose liability on any carrier other than the initial carrier nor by express declaration forbid any contract exempting carriers other than the initial carrier from liability for loss not occurring on their lines. That Court was of opinion, however, that this Court has construed the amendment as imposing liability on a terminal carrier for loss occurring on the line of a preceding carrier, notwithstanding a provision to the contrary in a bill of lading. It bases its opinion upon the following extract from Georgia, etc., R. Co. vs. Blish Co., 241 U. S. 190, 196:

"When it (the initial carrier) inserts in its bill of lading a provision requiring reasonable notice of claims 'in case of failure to make delivery' the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms (Kansas Southern Ry. vs. Carl, supra; Southern Railway vs. Prescott, supra); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery. The clause gave abundant opportunity for presenting claims and we regard it as both applicable and valid."

The Blish case was an action against a delivering carrier for its own conversion of a shipment and not for the negligence of any preceding carrier. In the foregoing excerpt from the opinion this Court was discussing only the right of the terminal carrier to avail itself of a provision in the bill of lading requiring claims to be presented within a specified time. The initial carrier is required by the amendment to issue a through bill of lading, and is forbidden to include a provision limiting its liability to its own line. The usual bill of lading does not attempt to avoid the through liability of the initial

carrier. It does, however, contain a provision, applicable solely to succeeding carriers, limiting liability to their own lines. Hence, when this Court said that the terminal carrier "takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms" it was not equivalent to saying that the liability of the terminal carrier is the same as that of the initial carrier, although the rights and liabilities of both carriers are found in the same instrument. We are, therefore, unable to agree with the Circuit Court of Appeals in construing this opinion as holding that the liability of the terminal carrier and of the initial carrier are identical.

Prior to the Amendment, as stated by this Court, in Atlantic Coast Line R. Co. vs. Riverside Mills, 219 U. S. 186, 197, "the general doctrine accepted by this Court in the absence of legislation is that a carrier, unless there be a special contract, is only bound to carry over its own line and then deliver to a connecting carrier." The effect of the Amendment is well summed up in the case of Missouri, etc., R. Co. vs. Ward, 244 U. S. 383, at page 386:

"The purpose of the Carmack Amendment has been frequently considered by this court. It was to create *in the initial carrier unity of responsibility* for the transportation to destination. Atlantic Coast Line R. R. Co. vs. Riverside Mills, 219 U. S. 186; Northern Pacific Ry. Co. vs. Wall, 241 U. S. 87, 92. And provisions in the bill of lading inconsistent with that liability are void. Norfolk & Western Ry. Co. vs. Dixie Tobacco Co., 228

U. S. 593. While the receiving carrier is thus responsible for the whole carriage, each connecting road may still be sued for damages occurring *on its line;* and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading." (The italics are ours.)

The reasoning by which the Circuit Court of Appeals construed this language as consistent with its decision is not clear. We presume, however, that the clause "the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading" was interpreted by that Court as meaning that the liability of the terminal carrier was identical with that of the initial carrier just as the clause in the Blish case stating that the obligations of the terminal carrier are measured by the terms of the bill of lading was given that construction. However, in Missouri, etc., R. Co. vs. Ward, supra, the error of this construction is even more apparent as the liability of the participating carrier is declared to be fixed by the *applicable* valid terms of the bill of lading.

It is true, of course, that the bill of lading issued by the initial carrier contains the obligations not only of the initial carrier but of the connecting and delivering carriers as well. This, however, is not equivalent to saying that the obligations of all the carriers are the same. One contract may well contain the obligations of numerous parties and yet the obligations of each differ from those of the others. The livestock contract in this case,

like bills of lading generally, contains provisions applicable solely to the initial carrier and others applicable solely to other carriers. It expressly limits the liability of connecting and delivering carriers to their own lines. It likewise expressly excludes the initial carrier from this limitation. The limitation is *applicable* to the delivering and not to the initial carrier and neither the Blish case nor the Ward case declare such limitation invalid.

In addition to this expression of the views of this Court we find in Atchison, etc., Co. vs. Harold, 241 U. S. 371, a case in which a terminal carrier was sued for delay occurring on the line of the initial carrier. It was conceded by the State Court (as the opinion of this Court observes) that unless the terminal carrier was made liable by the fact that it took up the bill of lading issued by the initial carrier and issued a new one it was not liable for the delay on the initial line. This Court in that situation, reversed the judgment for plaintiff as the issuance of a new bill of lading had no effect to change the liability of the parties. It is true that this Court did not expressly state that the terminal carrier was not liable for the delay on the initial line, but if the view of the Circuit Court of Appeals is correct, the terminal carrier would have been liable and this Court would, no doubt, have pointed out that fact.

In Charleston, etc., R. Co. vs. Varnville Co., 237 U. S. 597, this Court held void a statute of South Carolina imposing liability upon delivering carriers who failed to show that loss or damage to shipments did not occur on

their lines. Observing that under this statute delivering carriers in interstate commerce had been held liable for losses not shown to have happened on their lines, this Court held that the Carmack Amendment imposes liability on the initial carrier and that the state law was not contrived in aid of the Carmack Amendment "but to enforce a state policy differently conceived."

A review of the other decisions of this Court construing the Amendment, discloses the following:

*First:* The statement in every case that liability throughout is imposed on the initial carrier, coupled with the omission of any declaration of similar liability on connecting carriers.

> Atlantic Coast Line R. Co. vs. Riverside Mills, 219 U. S. 186, at 196, 201, 205 and 206.
>
> Galveston, etc., R. Co. vs. Wallace, 223 U. S. 481, 491.
>
> Adams Express Co. vs. Croninger, 226 U. S. 491 at 504.
>
> Norfolk & W. Ry. vs. Dixie Tobacco Co., 228 U. S. 593 at 594.
>
> Northern Pacific vs. Wall, 241 U. S. 87 at Page 90.
>
> St. Louis, etc., R. Co. vs. Starbird, 243 U. S. 592 at 595 and 604.

*Second:* Repeated statements that the initial carrier is the principal and the other carriers its agents.

Atlantic Coast Line R. R. Co. vs. Riverside Mills, 219 U. S. 186, at pages 196, 205 and 206.

Galveston, etc., R. Co. vs. Wallace, 223 U. S. 481 at 491.

Northern Pacific vs. Wall, 241 U. S. 87 at Page 92.

Since agents are not ordinarily personally liable for the acts of the principal or other agents, we think this interpretation of the amendment inconsistent with the view imposing liability on the delivering carrier (the last agent) for the sole negligence of a preceding agent.

*Third:* The statement in two cases that the liability imposed by the amendment aside from the responsibility for the default of a connecting carrier is not beyond the liability imposed by the common law.

Adams Express Co. vs. Croninger, 226 U. S. 491 at Page 511.

Kansas Southern Ry. vs. Carl, 227 U. S. 639, at Page 649.

A review of the decisions of subordinate Federal Courts discloses no cases other than that at bar in which liability was sought to be imposed upon a terminal carrier for the negligence of a preceding carrier, but the case of Hudson vs. C., M. & St. P. R. Co., 226 Fed. 38, 42, a District Court decision, holds that an intermediate carrier cannot be subjected to such liability.

A review of state decisions discloses a uniform line of authority against the imposition of such a liability on the delivering carrier.

Henderson vs. Kansas City Southern, 85 Southern (La.) 625. Decided June 30, 1920.

The Court of Appeals here certified to the Supreme Court of the State the question whether the Federal Statutes had abolished the Louisiana rule that a delivering carrier of an interstate shipment is liable upon proof merely that the goods were delivered to the initial carrier in good condition without proof that the injury or damage occurred on the line of the delivering carrier. The Court answered the question in the affirmative holding (at Page 627):

"The defendant in this case cannot be held liable on a presumption of law or without proof as a fact that the damage occurred while the freight was in defendant's possession."

New York, etc., Line vs. Lewis Baer & Co., 84 Atl. (Md.) 251. We quote at page 253:

"As neither of the defendants is the initial carrier, they are not in this case in any wise affected by the act of Congress called the Hepburn Act with the amendment thereto known as the Carmack Amendment, and are therefore subject only to the liability imposed upon them by the common law."

Knapp vs. Minneapolis, etc., R. Co., 159 N. W. (N. D.) 81. We quote at page 87:

"The Carmack Amendment, however, in no manner attempts to make a subsequent or terminal carrier liable for the acts of a preceding carrier. See Michie on Carriers, Sec. 3653."

Cedar Rapids Fuel Co. vs. Illinois Cent. Ry., 160 N. W. (Iowa) 353. We quote at Page 354:

"At the outset it is to be noticed that defendant was the terminal carrier, that the damages happened on the line of the initial carrier, and that defendant was in no manner responsible for the damages done the goods. In these circumstances there was no liability on the part of the terminal carrier. What is known as the 'Carmack Amendment' imposes liability for goods damaged or destroyed upon the initial carrier no matter where the loss occurs."

Emery & Co. vs. C., B. & Q. R. Co., 170 N. W. (Iowa) 540, gives the later approval of the same court to the language just quoted.

Houston, etc., R. Co. vs. Reichardt, 212 S. W. (Texas) 208.

St. Louis, etc., R. Co. vs. Mounts, 144 Pac. (Okla.), 1036.

St. Louis, etc., R. Co. vs. Davis, 185 S. W. (Ark.), 478.

As we read the decision of the Circuit Court of Appeals it imposes upon the delivering carrier, as well as the initial carrier, liability throughout, but allows to intervening carriers the benefit of the stipulation in the bill of lading. We are at a loss to understand how this can be, since the rights and obligations of the intervening carriers are found in the bill of lading as well as those of the delivering carrier. If the sentences from the Blish and Ward cases in which this Court observed that the bill of lading issued by the initial carrier fixes the responsibilities of the other carriers mean that the obligation of the delivering carrier is identical with that of the initial carrier, the same must be true also of intermediate carriers. To reach this conclusion it must be held that each carrier is agent for all of the other carriers, and that any one of several carriers handling a shipment may be sued for loss or damage to it whether occurring on the line of a preceding or succeeding carrier. In that event there must be inferred from the Carmack Amendment a right of action in favor of the connecting or delivering carrier thus made liable against the preceding or succeeding carrier which caused the damage, just as it is necessary to infer from the Amendment a liability of connecting and delivering carriers which did not exist at common law, and is not created by any express words of the Amendment.

As a matter of practice, a carrier receiving a shipment from another line is first informed of its existence when it receives the car containing it, together with the waybill instructing the carrier what to do with the car.

However, carrying the theory of liability of each carrier for the acts of any other carrier to its logical conclusion in case of the loss of a shipment on the initial line the other carriers would be liable, although they were not aware of the existence of the shipment.

It is, of course, apparent that the question here involved is one of very great importance to shippers and carriers, involving as it does a rule of action in hundreds of thousands of claims, and we respectfully pray that this petition for a Writ of Certiorari may be entertained to the end that the question may be definitely settled.

Respectfully submitted,

A. C. SPENCER,
C. E. COCHRAN,
JOHN F. REILLY,
Counsel for Petitioner,
510 Wells Fargo Bldg.,
Portland, Oregon.

# In the Supreme Court
of the
# United States

OREGON - WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Petitioner,

vs.

J. B. McGINN,

Respondent.

NOTICE

To R. L. Edmiston, Esq., of Counsel for Respondent,
*Sir:*

Please take notice that on the ...29th.....day of.....Nov....., 1920, upon the opening of the Court, or as soon thereafter as Counsel can be heard, the foregoing petition and brief, together with a certified copy of the entire transcript of the record, in the case, will be presented and submitted to the Supreme Court of the United States, in its courtroom in the Capitol, at Washington, D. C., in pursuance of its rules in such cases made and provided.

Dated this..3rd.day of.....Nov....., 1920.

A. C. SPENCER,

C. E. COCHRAN,
Hamblen & Gilbert
JOHN F. REILLY,
Counsel for Petitioner.

IN THE

# SUPREME COURT

OF THE

# United States

OCTOBER TERM, 1920.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
*Petitioner,*

*vs.*

J. B. McGINN,
*Respondent.*

Respondent resisting the Petition of said Petitioner for, and the issuance of, a Writ of Certiorari as prayed, for answer, sets forth:

## STATEMENT.

Statement of Petitioner is controverted and supplemented in this:

First. The complaint recited further that Petitioner received the forty-nine head of horses and mules at Huntington and before arriving at Walla Walla four head had died and the forty-five head were in a very starved, weak, sick and dying condition, so much so that plaintiff refused to receive the same except under protest, and upon oral agree-

ment with defendant, took over 39 head to care for and sell same to best advantage and report damage to defendant, one of which died soon after, and the six head remaining in hands of defendant died soon afterwards; that the bill of lading fixed value of $150.00 per head for the animals.

Second. The evidence and admissions in pleadings further show that the shipment was re-loaded at Pocatello at 10:20 A. M., February 19th, 1917, made a continuous run of 327 miles (Rec. 55) to Petitioners, Huntington yards, where they were held four hours (Rec. 49), before unloading for feed, water and rest, and re-loaded at 10:45 A. M., February 21st, 1917; one horse died in Huntington yards (Rec. 50), and proceeded to Pendleton, where one was dead in car and there others died in yards (Rec. 50), and at 9:30 A. M., February 22, 1917, they reached Walla Walla, where the 39 which were not dead or dying were turned to, and under protest, received by Respondent, the other six being dead or dying, making a death loss then of eleven head of agreed Bill of Lading price of $150.00 per head, which, plus the extra feed and pasturage of $220.00 (Rec. 46), equaled the verdice of $1870.00 (Rec. 89).

Liability was sought to be imposed upon Petitioner not only as a Partner, receiving part of the freight paid, and as forwarding Carrier, chargeable for its part in the negligent handling in its Huntington yards, but also for failure to Deliver

under its common law liability, measured as to amount of damage by the contract, and further, for failure to Deliver as the *delivering Carrier* under the contract and under the Carmack Amendment Statute, as required by the through Bill of Lading contract, in which contract Petitioner being a party in interest, receiving a part of the freight and representing other parties therein interested, as contemplated by said statute, and having right of recoupment, is liable for full damage to the shipment; and also did collect all the freight payment for the entire route of the shipment.

Respondent believes the judgment of the Circuit Court of Appeals, Ninth Circuit, is both just in fact and correct in law, as is more fully set forth in the judgment itself, the decisions cited therein, the record therein and the Answer Brief attached.

WHEREFORE, Respondent respectfully prays that the Petition herein praying for a Writ of Certiorari to be issued to said Circuit Court of Appeals be denied and the said judgment of said Court stand affirmed and that Respondent may have such further relief herein as may be deemed lawful and appropriate, and Respondent will ever pray.

R. L. EDMISTON,
540 Rookery Bldg.,
Spokane, Wash.
*Counsel for Respondent.*

STATE OF WASHINGTON, )
COUNTY OF SPOKANE, ) ss.

R. L. Edmiston, being first duly sworn, on oath says: That he is counsel for Respondent; that he has read the foregoing controverting and supplemental facts and the facts therein stated and set forth are true as he verily believes.

R. L. EDMISTON.

Subscribed and sworn to before me this 18th day of November, A. D. 1920.

F. W. GIRAND,

Notary Public for the State of Washington, residing at Spokane.
My commission expires Sept. 29, 1924.

## BRIEF.

Petitioner's first reason relied on for a Writ herein is set forth in words, to-wit:

### FIRST.

"The said Circuit Court of Appeals in an action against a delivering carrier to recover for damage to a shipment occurring on the line of a preceding carrier, misinterpreted the Carmack Amendment to the Interstate Commerce Act (34 Stat. L. 584) by holding that under said Carmack Amendent 'the defendant here, being a terminal carrier, is liable for the loss and injury to the stock comprised by the shipment, although occasioned while it was in

transit over the Short Line,' and also misinterpreted the decisions of this Court."

From the reading of the opinion and the above reason, it appears that the Circuit Court of Appeals did not construe or interpret the statute in question, but only interpreted and applied the decision of the Supreme Court in the *Georgia etc. Co. vs. Blish Co.* case to the facts in this case; and that but one point is in fact contained in said first Reason for the Writ.

No attempt is made to distinguish the case at bar from the one followed and applied by the Court, but claims that the application is in fact a misinterpretation of the opinion of the Supreme Court in the said Georgia case.

While neither the statute nor the Bill of Lading contract, in express words, make the delivering carrier liable for all loss and damage to a shipment as it does the receiving carrier, yet both necessarily imply it and the contract, in this case, provides for notice in case of loss, to be given "to the station agent at point of delivery or at point of origin," thus distinguishing the initial and delivering carriers from all others and making the delivering carrier equal to the initial carrier as a source to whom owner or holder of Bill may look to claim and recover damage for loss or failure to deliver a shipment in good condition and in due time.

The 1916 amendment to the statute provides:

"No right or title of a third person, unless

enforced by legal process, shall be a defense to an action, brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand."

Aug. 29, 1916, C 415, Sec. 19; 39 Stat. 54.

Manifestly this does not mean that a consignee in San Francisco, of goods in hands of a carrier there which were shipped by his consignor and initial carrier of New York must make his demands and institute his action for relief against the initial carrier in a New York Court, where only jurisdiction could be had. This would be unjust and an inadequate remedy for a consignee. While in the *Georgia etc. vs. Blish. etc.* case, this Court says:

> "The aim was to establish UNITY OF RESPONSIBILITY (*Atlantic Coast Line R. Co. vs. Riverside Mills,* 219 U. S. 186, 199-203, 55 L. Ed. 197, 179-181, 31 L. R. A. (C. N. S.) 7, 31 Sup. Ct. Rep. Produce Exch., 240 U. S. 34, 38, *ante,* 511, 515, 36 Sup. Ct. Rep. 230), and the words of the statute are comprehensive enough to embrace responsibility for ALL LOSSES resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation, which, as defined in the Federal Act, includes DELIVERY."

And also theerin, further says:

> "But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were ap-

plicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations."

This statutory "Unity of Responsibility" necessarily brings about "Unity of Contract" for each interstate shipment, in which the consignee or holder thereof is an important party and must be accorded a just and adequate remedy, from his standpoint, in his rights to recover loss or damage, including Failure to deliver and not be required to cross the continent to enforce same against an initial carrier.

The decision of the Circuit Court of Appeals, Ninth Circuit, herein is a just, correct and necessary interpretation of both the statute and the transportation contract and is in harmony with the construction thereof by this Court.

Petitioner's "First Reason" is erroneous and unfounded in law or fact.

Furthermore, the Bill of Lading contract expressly gives the consignee or holder the election as to which, the initial or delivering carrier, notice for loss, damage, etc., shall be served upon and such right must necessarily be construed as including action and recovery in Court against the carrier so served with notice, which suit must be as comprehensive as the notice and cover any and all loss or damage on any and all portions of the route over which the shipment came.

The statute, the contract herein, and the decision

of this Court relied on by the said Circuit Court of Appeals, are all controlling, and the cases cited by Petitioner, are not in point and have no application, and will not be specially considered.

SECOND.

Conflict between case at bar and State Supreme Court cases cannot constitute a ground or Reason for a Writ of Certiorari to issue from this Court to a United States Circuit Court of Appeals. No such jurisdiction is conferred by statute.

THIRD.

Petitioner's Third Reason for the Writ is stated as *Conflict* of case at bar with the decision of a United States District Court.

The case of *Hudson vs. C., M. & St. P. Ry. Co.*, 226 Fed. 38, is relied on for this point. This is the case which caused the trial Court herein to fall into error against claim of Respondent, that the *Georgia etc. vs. Blish etc.* case controlled. A glance at the Hudson case shows it has no application herein; the defendant was neither an initial nor a Delivering carrier, but an intermediate; the evidence showing that shipment cleared its lines before the damage occurred to the shipment.

There was no provision in the Bill of Lading contract charging it with duty of Delivery or naming it as a party on whom Notice of loss or damage may be served, as is the fact in the case at bar. A consignee or holder suing an Intermediate car-

rier, whose only duty under the contract is to promptly and properly transport the shipment over its lines, must prove loss or damage occurred on defendant's lines or fail; while if Delivering Carrier, on whom Notice of Loss or damage may be served and charged under the contract with the duty not only to safely transport, but to promptly Deliver the shipment in good condition, is sued by the consignee or holder, recovery may be had for the full damage preventing proper delivery, no matter whether caused by it or other carriers handling the shipment.

This must be true or the Bill of Lading could not constitute a *"Unity of Contract"* giving the consignee or holder adequate rights, equal to that of the consignor, and the uniform Bill of Lading contract would not provide for serving of notice of loss or damage upon *either* the delivering or initial carrier.

It would not be just or equitable to say that Congress enacted a law and the Interstate Commerce Commission established a uniform Bill of Lading contract that would give a Consignee or holder the right to serve his Notice of Loss or Damage on the Delivering Carrier and then force him to cross the continent to sue the Initial Carrier in order to recover. This Court has never yet so construed the Carmack Amendment Statute, nor the uniform Bill of Lading contract, settled in form by the Interstate Commerce Commission.

Manifestly, from this point of view, the decision herein is right and no legal right has been denied Petitioner and no reason for the Writ obtains under Petitioner's Third Point.

FOURTH.

This Fourth Reason, while sounded in *Gravity of importance* from Petitioner's point of view, would be lamentably intolerable and unconscienable from the point of view of the consignee or holder of the Bill of Lading. Were it otherwise than as ruled herein by the Circuit Court of Appeals, Ninth Circuit, it would, in effect, eliminate the consignee or holder from being a party in interest in the contract of "transportation."

Therefore, the claimed Gravity of the case appears to be nothing more than a declaration of an imaginary error, militating against Petitioner but without foundation in law.

> "But it is obvious that this proposition challenges not the power, but the wisdom of exerting it, since in the nature of things the power to constitute the *initial* carrier the agent of the terminal carrier is not different from the power to make the terminal carrier the agent of the initial carrier."
>
> *Atlantic C. L. R. Co. vs. Glenn,* 239 U. S. 388, 393, 60 L. Ed. 344, 347.

While the Carmack Amendment expressly makes the initial carrier liable for loss or damage caused by it or any connecting carrier including terminal carrier, it does not make the initial carrier *exclu-*

*sively* liable but expressly reserves to parties interested all rights of action then existing, which would include any rights therein or thereafter created by statute, correct construction, necessary inferences, rulings of Interstate Commerce Commission, or by Contract rights or provisions.

Petitioner, in its further Brief argument, goes "for a field" seeking analogous rulings of other Courts, but fails to cite or quote from any case in point where the statute, bill of lading contract provisions, and the consignee or holder, are all fairly considered, especially when the 1916 Amendments to the Carmack Amendment Statute and the opinion of this Court in the *Georgia etc. vs. Blish etc.* case are considered.

This Court having repeatedly ruled that by the Carmack Amendment Act a "Situation has been brought about by which, though independently managed, connecting carriers become in effect, one system" and that "The aim was to establish Unity of Responsibility" and that "The words of the Statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation, which, as defined in the Federal Act, includes 'Delivery'," it necessarily follows that the provision in the established uniform Bill of Lading contract, giving the holder, whether the consignor, consignee or assignee thereof, the right to serve his Notice of loss or damage to the shipment caused by any or all carriers transport-

ing same, upon either the Initial or Delivering carrier, giving the Holder also the *right to sue* either the initial or delivering carrier and recover for *all loss* or DAMAGE caused by any or all carriers handling the same under the contract.

> *Georgia etc. R. Co. vs. Blish etc. Co.,* 241 U. S. 383, 60 L. Ed., 948 and cases there cited.

Therefore "the terminal carrier is bound, by the Bill of Lading and the contract of the initial carrier, to deliver, as the initial carrier is bound, and is liable for any loss or damage to the property which has been occasioned through the conduct of the carriers while in transit."

(Opinion case at bar.)

Respondent respectfully submits that the Prayer of Petitioner should be denied and the Prayer of Respondent should be granted herein.

Respectfully submitted,

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